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CONVEYANCER'S NOTEBOOK.

Conveyancers have a particular interest in tendering their respectful congratulations to Lord Maugham on his elevation to the Woolsack. In the first place Lord Maugham is the first Chancery Judge to attain this dignity since the Judicature Act, 1873. This is not so significant as it may seem, because, although the Lord Chancellor is technically the President of the Chancery Division of the High Court, it has not been the custom since the Judicature Act for him to take an active judicial part in that Division. It is the work of the Chancery Division which particularly affects conveyancers, and it is a matter of gratification that a former Judge of that Division should now be its President and the Head of the Judiciary of the Kingdom. It cannot fail to be of advantage that the Lord Chancellor should have had wide practical knowledge of the work of the Chancery Division as counsel and Judge.

In the second place Lord Maugham's appointment to the Bench in 1928 has given him great opportunities of insight into the practical working of the Property Legislation of 1925. He was among the number of learned Judges who bore the heat and burden of the day in settling the earlier problems afforded by that complex body of Statutes. If the machinery creaks in any place no one knows it better than he. No one now has better opportunities, if he thinks it desirable, to oil the wheels and eliminate the creaks if possible.

Restrictive covenants—Registered land—Practice note.—Following inquiries the writer is convinced that it is a common practice in

dealing with transfers of registered land subject to existing restrictive covenants not to insert a covenant by the transferee to observe the covenants and indemnify the transferor against breaches. This is particularly common in the case of transfers of the whole of the property comprised in the title. No doubt the practice has arisen because it appears to be unnecessary to refer expressly in the transfer, particularly of the whole of the property, to existing covenants entered on the Charges Register. The transferee is deemed to take subject to such entries by the effect of section 20 of the Land Registration Act, and the usual interpretation of this section is that it is, therefore, unnecessary to make the transfer expressly subject thereto. This interpretation of the Act appears to the writer to be correct, but it does not cover the question of indemnity as between the original covenantor and his transferees. Apart from the express form of the covenant the original covenantor remains liable in respect of any breach of covenant, whether or not it is entered on the Charges Register, though the breach be committed by a transferee. In this respect the law is the same as in unregistered conveyancing. As a result, wherever an indemnity covenant would have been inserted in the case of unregistered conveyancing it should equally be inserted in registered conveyancing.

This seems to be the view of the framers of the Land Registry Rules. Rule 110 provides that where a transfer is made of land "subject to a charge or other incumbrance appearing on the register" covenants by either party to pay the money owing and to indemnify the other party may be added to the transfer and "*may* be noted on the register". The position with regard to restrictive covenants is rendered rather more difficult because of the method usually employed by the Registry of noting restrictive covenants, a practice which has varied from time to time. On older titles it is not uncommon to find the restrictions referred to only; in later titles it was customary to include the restrictions but not the terms of the actual covenant, but it is understood that the modern practice is to include the covenant itself. The last method indicates clearly whether a covenant of indemnity is necessary, as it usually is, since it will disclose whether or not the covenant excludes personal liability. In other cases and in the absence of the instrument imposing the covenant it is safer to assume that the covenant for indemnity is necessary. Since the Registry retain the abstract of title on first registration, a covenant is often not accessible by inspection of the abstract where the land has subsequently been sold in plots prior to registration. Where the transferor is not the original covenantor, it is submitted that it is not safe to assume that he has entered into no covenant for

indemnity. These facts can only be ascertained by inspection of the transfer which, commonly, can only be done by personal search at the Registry.

It is submitted that where land is transferred subject to existing restrictive covenants the transferor's solicitor must in the usual course insert a covenant for indemnity. This does the transferee no harm, since if the transferor is not liable the transferee will not have to indemnify him.

In the meantime it may be said that it is not always easy, where titles are registered subject to restrictive covenants, for the Registry to be able to insert the actual words of the covenant, since they may be contained in a document not lodged with the papers for registration. It is suggested respectfully that, *wherever* it is possible, the Registry should always extract the terms of the covenant in full. Would it be to much to suggest that a note of the indemnity covenant should be made?

[For the convenience of readers a precedent of a transfer subject to restrictive covenants has been inserted in this volume, *post*, p. 440.]

Undivided shares and trusts for sale.—A correspondent has communicated the following letter of general interest:—

"May I call your attention to the following point in connection with death duties on undivided shares in land?

"There is, I believe, a general impression that in view of section 16 (4) of the L. P. A., 1925, and section 53 (3) of the A. E. A., 1925, which provide that nothing in these Acts shall alter any duty payable in respect of land, an undivided share in land is always treated as land for death duty purposes. I would point out that, while this is perfectly true in the case of an undivided share created before 1926 and converted into personalty by the operation of the statutory trusts imposed by the L. P. A., 1925, yet where a conveyance is made to would-be tenants in common expressly on trust for sale in the form customary since 1925, there is no statutory conversion and consequently the interests of the beneficiaries must be treated as personalty for death duty purposes. This matter is dealt with very clearly in *Dymond on Death Duties* (8th ed.), pp. 8 and 9.

"I suggest, therefore, that the practice of conveying to would-be tenants in common expressly on trust for sale is open to criticism, since it results in the loss of the right to pay death duties by instalments and causes interest to run from the date of death

instead of from the expiration of one year from the date of death. Would it not be better, instead of conveying to the parties expressly on trust for sale, to convey to them expressly as tenants in common, using the form of habendum customary before 1926 and relying on section 34 of the L. P. A., 1925, to impose the statutory trust for sale? It would seem that, if this form of conveyance were to be used, there would then be a statutory conversion under section 34 of the L. P. A., 1925, with the result that the interests of the beneficiaries would be land for death duty purposes."

We agree with the views of our correspondent concerning the undesirability of the practice of inserting an express trust for sale. It seems quite clear that where an express trust for sale is inserted there is no question of a conveyance of undivided shares in land for the purpose of section 34 of the Law of Property Act, 1925, and it is thought that this is equally true with regard to joint tenancy. In both cases the beneficial interest is by virtue of the conveyance only in the proceeds of sale and not in land. It is true that in *Re Witham*, [1922] 2 Ch. 413, proceeds of sale were held to be sufficiently land to fall within the Real Property Limitation Acts, but this decision turns upon the precise construction of those Acts and, it is thought, would not be applicable so generally.

If this view is an accurate interpretation of the effect of an express trust for sale upon the application of sections 34 and 36, then the result of such a conveyance is to exclude the statutory trusts altogether. While these trusts have produced some very unexpected results (cf. *Re Flint*, [1927] 1 Ch. 570; *Re House*, [1929] 2 Ch. 166; *Bernhardt* v. *Galsworthy*, [1929] 1 Ch. 549; *Re Davies' Will Trusts*, [1932] 1 Ch. 530), and while the statutory trusts do operate as conversion of the beneficial interest except for express savings in the Act (*Re Kempthorne*, [1930] 1 Ch. 268), the Act does contemplate some peculiarities of the position and provide for them. For example, under the amendment of section 36 by the amending Act it is provided that nothing in the Act affects the right of a survivor of joint tenants solely beneficially entitled to deal with his legal estate as if it were not held on trust for sale. It is submitted that this convenient saving clause would not be effective if the trust for sale was express.

Furthermore, it is possible that the statutory trust for sale has a wider overreaching effect than an ordinary express trust for sale : see *Re Ryder and Steadman's Contract*, [1927] 2 Ch. 62, *per* Sargant, L.J. It is obvious that it is to the advantage of the trustees for sale to possess this power, if it exists, for the purpose of making title.

In these circumstances we support the view of our correspondent that it is a mistake to employ a precedent creating an express trust for sale. If it is felt that there should be some reference to the creation of a trust for sale by the statute, a simple form would be "to hold the same unto X and Y in fee simple upon the statutory trust for sale for themselves beneficially entitled in undivided shares" (specifying them if unequal) *or* "as joint tenants", as the case may be. It is thought that the reference to the statutory trust for sale does not have the effect of creating an express trust for sale, since it bears clear reference only to the statutory provisions having this operation.

The following note has been contributed by Dr. E. O. Walford :—

Brief reference was made in our last issue to the question whether rentcharges affecting land held by companies were required to be registered under the Companies Act, 1929. It is understood that the matter is still being considered by the Provincial Law Society referred to in our last issue. It is also understood that the Board of Trade have (in correspondence) pointed out that section 93 (1) (d) of the Companies (Consolidation) Act, 1908, required the registration of a mortgage or charge on any land wherever situate or any interest therein, and have stated that under that Act companies which had created such rentcharges had registered the document creating the charge under section 93. This must, presumably, mean that some such companies have so registered, as it seems that the practice is by no means uniform.

As the Registrar of Joint Stock Companies accepts for registration under sections 79, 81 and 91 deeds creating rentcharges affecting land held by companies it must be assumed that the Registrar considers such deeds to be registrable; but it will be appreciated that the Courts alone are competent authoritatively to interpret an Act of Parliament and that any views expressed by the Board of Trade or deducible from the practice of the Registrar of Joint Stock Companies are necessarily subject to that reservation.

From certain correspondence received it would appear to be desirable to explain the effect of sections 79, 81 and 91, all of which deal with different cases :—

(1) The effect of section 79 is that where a company has (after July 1, 1908) created a charge on "land or any interest therein" the necessary particulars must be delivered to

the Registrar within twenty-one days from after the date of the creation of the charge. If such particulars are not so delivered, then not only are penalties imposed on the officers of the company but the charge is void against the liquidator and any creditor of the company so far as it confers any security on the company's property, although the company's obligation to "repay" remains. Indeed, when the charge so becomes void the money secured thereby immediately becomes payable (section 79 (1)). What becomes payable in the case of a rentcharge the Courts alone are competent to decide!

Registration after the twenty-one days can only be effected on application to the Court. The necessary extension is usually granted without prejudice to the rights of parties acquired prior to the date when the charge is actually registered.

(2) Under the Companies Act, 1929 (but not under the Act of 1908) it is now necessary where land is acquired subject to a charge, to file with the Registrar within twenty-one days of such acquisition particulars of the charge. Whilst the company and its officers are liable to a penalty in case of default, failure to register the particulars does *not* avoid the charge and in practice the Registrar generally permits registration out of time without application to the Court.

(3) Section 91 dealt with charges on (*inter alia*) land acquired before the commencement of the Companies Act, 1929, and required the registration within six months thereafter of all such charges. Here again, as in the case of section 81, the only result of non-registration is that the company and its officers are liable to penalties.

As it is unlikely that the Registrar would claim penalties in cases of non-registration arising from an oversight, it will be seen that section 79 cases are far the most important cases for consideration in view of the possible avoidance of the charge upon the company's property.

Requisitions on title.—A correspondent has written to us complaining of the manner in which replies to requisitions are so frequently framed. The letter is rather long to print and we have thought it may hardly be desirable to do so. But the burden of the complaint is that constantly solicitors are content to reply without giving any information. This is sometimes very prejudicial

to the purchaser. He instances, for example, the common form requisition and reply as follows :—

Are there any telegraph or other poles on the land? If so, the agreement or agreements should be handed over on completion.	Not to our knowledge.

He then points out that in the case of building land this requisition has a double importance : First, to obtain on completion any agreement; secondly, to reply to the questions concerning overhead transmissions asked by a local authority under the Town and Country Planning Acts on application for approval of plans.

This is one only of the illustrations given by our correspondent.

To us the complaint seems to fall under two heads. First, a reply that the solicitors have no knowledge is inadequate. Replies should always, it is thought, be expressed in terms of the vendor's knowledge. This, no doubt, is frequently, and indeed usually, implied, but it should be expressed. There is a danger that in the hurly-burly of practice the necessity may be overlooked of obtaining answers to all requisitions affecting the land, as distinct from the title, from the client himself. A tedious, and sometimes difficult, process is involved, but it is none the less necessary.

Secondly and more importantly, the answer should give all details within the vendor's knowledge unless it is a matter of search. It is not fair to put upon the vendor the obligation of replying, perhaps imperfectly, on matters which can be accurately ascertained by search. Where search will not disclose details within the vendor's knowledge these should be supplied. For example, a reply to the requisition concerning outgoings does not seem to be adequately dealt with by a reply to the effect that there is a drainage rate of 1s. Some details should be given concerning the name and address of the authority entitled to collect it and if possible the right to collection.

It may be added in this place that one reason for insufficiency is due to the failure to employ the method of inquiries prior to contract. This practice is growing, but is not used enough. Many of the replies to requisitions do not arise on title in any strict sense, since after the contract the vendor is not concerned or legally obliged to reply to them. The legal answer may be that, if any, the purchaser takes subject to the rights about which requisition is made. Prior to contract the purchaser can insist on receiving a satisfactory answer before he will sign the contract. It is feared that when inquiry is made prior to contract it is not unusual to meet the same question in a printed form of requisition. This is not encouraging.

We do not pretend to have exhausted this important topic in a brief note and have made no attempt to deal with the law determining what requisitions can be validly insisted upon. We have attempted only to open the subject and should be glad to have the views of correspondents.

Intestate's residuary estate.—A subscriber writes as follows:—

May I suggest that you ask the learned draftsman of the Forms 10 and 11 in the December number of *The Conveyancer*—Appointment of New Trustees of Intestate's Residuary Estate and Assent to the Vesting in them of Unsold Land—to reconsider his drafts.

I notice the draftsman says nothing about the stamp on the assent. If submitted for adjudication a stamp of 10s. would be required, as being the equivalent of a conveyance to new trustees.

I submit that, even if the assent were duly stamped, a purchaser would be entitled to ask how any persons other than the administrators could become entitled to hold an intestate's land upon the trust for sale mentioned in the assent without being duly appointed as trustees.

A purchaser then might argue that since the administrators could only appoint new trustees after they (the appointors) had ceased to be mere administrators and become trustees, they could not thereafter pass the land by assent. In other words, in order to justify the transfer of the land to new trustees the deed of appointment must precede the transfer and the deed estops the administrators from transferring otherwise than as trustees, *i.e.*, either by conveyance or by vesting declaration, express or implied, under the Trustee Act. There is no passing of the legal estate from personal representatives to themselves as trustees, and any acknowledgment that they have become trustees is as effective as if they had signed an assent to the land vesting in themselves as trustees. The argument might not prevail in a Court of law, as it might be said that the two documents were executed at the same time and the administrators in signing the assent were still momentarily entitled to act as administrators merely. It is surely, however, advisable to avoid the possibility of having to go to Court to determine the point.

The learned draftsman sends the following reply:—

Having read and considered with care the somewhat subtle legal argument contained in our correspondent's letter, I find myself

quite unable to agree with it. I remain of the opinion that, where administrators desire to vest the intestate's property in trustees upon the statutory trusts for sale, the correct method of effecting the transaction is by two documents: an appointment of new trustees, and an assent, subsequently executed, vesting the property in the trustees so appointed.

It is suggested the objection to this method of vesting the property in the new trustees is that a subsequent purchaser would be entitled to ask how any persons, other than the administrators, become entitled to hold the intestate's land upon trust for sale. It is submitted that, unless the curtain provisions in section 36 of the Administration of Estates Act, 1925, are entirely ineffective, this is just what a purchaser is not entitled to ask. Under section 36 (7) an assent is "sufficient evidence" in favour of a purchaser that the person in whose favour the assent is made is the person entitled to have the legal estate conveyed to him and upon the proper trusts. In this case the assent is in favour of named persons on trust for sale. Under sub-section 7 a purchaser is bound to assume that the persons taking the property are entitled to it.

The argument that the administrators could only appoint trustees after they have ceased to be administrators appears also to me to be unsound. There is nothing to prevent administrators appointing trustees before the administration is completed and vesting the deceased's estate in such trustees from time to time as the administration proceeds. So long as the administrators have not dealt with the legal estate, they hold it as administrators and can deal with it as such under section 36. The argument advanced appears to overlook both the wording and intention of the section. The mere fact that trustees are appointed does not of itself amount to a declaration that the administrators have themselves ceased to act as administrators and have become trustees. It is a preliminary step to divesting themselves of the property, but only a preliminary step.

If this method of effecting this transaction is wrong, the appointment will have to be brought on to the legal title and purchasers will then be seeking information as to the nature of the equitable interests arising by reason of the intestacy and investigating the need for and propriety of the appointment. If beneficial interests are to be kept off the title, this can only be done by keeping the appointment and the assent separate.

Nor can I agree that the assent requires a 10s. stamp. Subsection 11 of section 36 expressly provides that an assent shall not operate to impose any duty. The assent merely operates to vest

the property in the persons entitled to have it vested in them. The stamp duty payable in respect of the transaction is 10s. on the appointment.

Registered land—official searches.—The following notice has been received from the Land Registry :—

1. The Chief Land Registrar announces that Form 94 will in future be published as two separate forms :—

(a) Form 94A affecting searches of the *whole*,

(b) Form 94B affecting searches as to *part*,

of the land comprised in a registered title.

2. This change brings Form 94 into line with other forms, such as transfers and charges where separate forms are used for transfers or charges of the whole and of part. The change will make each of the forms more simple to fill up and the directions on each will be more readily followed as they will be confined to those applicable to the search of the whole or part as the case may be.

3. The new Forms 94A and 94B are now available and can be obtained from H.M. Stationery Office and Law Stationers, price 1d. each, or twenty-five for 1s. 6d. Solicitors holding a stock of the existing Form 94 may, of course, continue to use such forms until their supplies are exhausted.

THE RIGHT TO TAKE WATER ON THE LAND OF ANOTHER.

By J. S. Fiennes, of the Middle Temple, Barrister-at-Law.

In a recent case (*a*) a reservation of all the water on land sold was held to be void, and it is surprising to find in a leading book of precedents (*b*) a reservation in effect identical with that construed in the case mentioned. Though in both forms the initial mistake is effectively covered up by reserving a right to come and fetch the water reserved, the attempt at reservation, or more strictly exception, illustrates the pitfalls into which conveyancers may be led by the anomalous position in law of water. This article is an attempt by considering another of these pitfalls to elucidate the general nature of the right to take water.

The position to be considered is one which is unlikely to occur often nowadays, but when it does the rights involved will be of considerable importance to the parties. Blackacre and Greenacre both derive their only convenient supply of water from a reservoir or cistern situated in the middle of Blackacre and filled entirely by artificial means, as by pumping or by collecting rain-water, so as to make the water private property (*c*). The owner of both wishes to sell Blackacre, but to keep Greenacre and with it the necessary right to draw water or to water his cattle at the reservoir. For reasons of expense or otherwise, it is impracticable to take a supply in pipes on to Greenacre. The question is, whether such a right can be effectively retained, and if so in what form.

If the supply had been natural, so that the water was common property (*c*), there would have been no difficulty in reserving a right to take the water, but here that is not possible. Such a right, to be effective for all time, must be either an easement or a *profit à prendre*. A right to take what may be called "artificial water" on the land of another cannot be either.

The only direct authority for this seems to be that of Bracton (*d*); he says in effect that an assize of novel disseisin may be had for interference with a right to take water from a spring,

(*a*) *Re Simeon*, [1937] Ch. 525, *ante*, p. 171.
(*b*) 2 Prid. (23rd edn.), p. 178.
(*c*) *Race* v. *Ward*, 4 E. & B., p. 708.
(*d*) Bk. IV, c. 44, f. 233a.

lake, well or fish-pond, but that this is not so of a cistern, because a cistern is supplied neither by "perpetual" nor by "living" water but by collecting rain-water. It is clear (*e*) that the distinction meant (whatever is the exact meaning of "*perpetua*" and "*viva*") is between water naturally in the ground and water artificially collected, so as to become the collector's private property.

It is true that in one case (*f*) a right to take ice from a canal is spoken of as a licence in a way which undoubtedly makes it seem that a licence of profit (that is, a *profit à prendre*) was meant. If that was meant, then as it is so well understood (*g*) that a right to take natural water is an easement, it must be supposed that the Court took the water in the canal to be artificial water and thought a right to take such water could exist as a profit. Indeed it is not uncommon to find it so regarded (*h*) : the easement to take natural water is looked on as an exception from a general rule that "a right to take something off another's land" (*i*) is a profit; and as the exception is expressly limited to natural water, it is assumed illogically that artificial water falls within the rule.

But a short consideration of principle will show that Bracton's position is perfectly right; and the canal case (*k*) is no real authority to the contrary. For in that case, first, either a licence in the ordinary sense, or an easement was enough for the decision, and secondly, no suggestion was actually made that the water in the canal was anything but natural water, which in the circumstances it probably would have been.

In English law physical things may either be or not be the subject of property, and may either be or savour of, or not be nor savour of, the realty. Thus there are for this purpose four classes of things :—

(a) things the subject of property which are—
  (i) part of the realty, or
  (ii) not part of the realty;
(b) things not the subject of property which are—
  (i) part of the realty, or
  (ii) not part of the realty.

(*e*) And so taken in *Race* v. *Ward*, 4 E. & B., p. 712.

(*f*) *Newby* v. *Harrison*, 1 J. & H., p. 398 (affirmed on appeal, see *Carr* v. *Benson*, L. R. 8 Ch. 524).

(*g*) Since *Race* v. *Ward*, 4 E. & B. 702, cf. *Harrop* v. *Hirst*, L. R. 4 Exch. 43. But the reasons seem to have been imperfectly remembered by the Court which decided the leading case : see *Race* v. *Ward*, 7 E. & B. 384.

(*h*) It is submitted that, *e.g.*, Cheshire, 4th edn., pp. 223-4, is misleading in this respect, and cf. 1 K. & E. (13th edn.), p. 556, f. 6.

(*i*) Definition of Lindley, L.J., *Sutherland* v. *Heathcote*, [1892] 1 Ch. 484.

(*k*) *Newby* v. *Harrison*, *ubi supra*.

Examples are: of (a) (i), unhewn coal; of (a) (ii), books or wine; of (b) (i), game and fish in their natural state (*l*); of (b) (ii), natural water and air (*m*).

Now a right to take something off another's land involves two rights: first, a right to go on that land, and, secondly, a right to take the thing in question. Such a right (if perpetual) is a profit, if the thing taken is part of the realty; but if not, is an easement, for a profit is a right to take part of the realty or of the produce of the realty (*n*). It will be seen that a grant of the right to take something in class (b) is a grant only of the right to come on the grantor's land; for the grantee already has the right to take the thing if he can come to it. If the thing is within (b) (i) it is a profit (*o*); if within (b) (ii) it is an easement (*p*).

But a grant of the right to take something in class (a) is ordinarily a grant of both rights, the right to come on the land and the right to take the thing. Now it is a fundamental principle of the common law that (apart from certain special cases of common law powers) no one can grant any right in property except in virtue of present ownership, or at least present possession. It follows that there can be no easement (which is a perpetual right) to come and take chattels from another's land; it would seem to follow, too, that there can be no profit to come and take things within class (a) (i) unless they are part of the realty at the date of the grant of the profit. Otherwise there could be a profit to come and take cultivated crops, which it is submitted there cannot.

Of course it may happen that the grantee of the easement has the right to take the chattels, independently of such grant: in that case the reasoning of the last paragraph would not apply, and there would presumably be a good easement. Thus the vendor of a house might reserve to himself the right to come and fetch his wine from the cellar as and when he wanted it, instead of taking it away at once; and this right would, it is conceived, be binding on anyone taking the house. Indeed it is just possible that the grant of a right to take chattels of a given class off the grantor's land might on construction be saved in law as the grant of an easement to take any such chattels to which the grantee was entitled; but the authority of Bracton (directly) and of cases like *Race* v. *Ward* (by implication from the expressions used) is against this, and such a right would be in practice useless, where, as in the case under

(*l*) *The Case of Swans*, 7 Co. 17b.
(*m*) *Race* v. *Ward*, *ubi supra*.
(*n*) *Ibid.*, p. 711: *i.e.*, the profit as well as the taking must be *in alieno solo*.
(*o*) *Wickham* v. *Hawker*, 7 M. & W. 63; *Fitzhardinge* v. *Purcell*, [1908] 2 Ch., p. 163.
(*p*) *Race* v. *Ward*, *ubi supra*.

discussion, it is necessary to get both title to come on the land and title to take the chattel.

It follows that a right to come and take artificial water cannot be an easement, because there can be no easement to come and take another's property off his land; nor can it be a profit, because if such water were part of the realty, the water which is to be collected in the future could not be so at the time of the grant. But it is also not a profit, because water cannot be part of the realty. When it is stored for anyone's private use, it is transferred from class (b) to class (a), but not also from class (ii) to class (i). The only way in which that can happen in law is by annexation to the soil, on the principle that *quicquid plantatur solo, solo cedit*; and water is in its nature incapable of such annexation (*q*). Water, then, if the subject of property at all, not only can be (*r*), but must be, personal property.

The owner of Greenacre, then, in the case put, cannot reserve to himself any right to come and fetch water from Blackacre, if he sells the reservoir with it. It is suggested that the right thing to do in such a case is to except a specified part of the soil of the reservoir from the conveyance of Blackacre (*s*). There will then have to be inserted (besides provisions for repair, etc.) cross-easements in favour of both owners to the flow of water from one part of the reservoir to the other, and a right of way, limited to the purpose of drawing water for supplying Greenacre, to the excepted part. The first of these would no doubt be implied, if omitted, under the rule in *Wheeldon* v. *Burrowes* (*t*), but only in favour of the purchaser of Blackacre. Similarly, a way of necessity would be implied for the owner of the excepted part of the reservoir to come to it, but this right would have no relation to the needs of Greenacre, and might be much more extensive. It should therefore be expressly excluded, as is certainly possible (*u*).

Where, on the other hand, it is possible to lay pipes from the reservoir to Greenacre, it will be more convenient to grant a right to the flow of water in the artificial watercourse so constituted (*w*). This seems (*x*) (but it has, perhaps, not been expressly decided) to be a good easement, though the supply is purely artificial. Such

(*q*) See notes to *Elwes* v. *Mawe*, 2 Sm. L. C. (13th edn.) 193. The floor of a private skating rink might raise an academic query.

(*r*) So as to be subject to larceny, *Ferens* v. *O'Brien*, 11 Q. B. D. 21.

(*s*) This seems less undesirable than vesting the whole reservoir in both owners on the statutory trusts for themselves as tenants in common in fee.

(*t*) 12 Ch. D. 798.

(*u*) Gale, Easements, p. 181; cf. *Menzies* v. *Breadalbane*, 4 F. 59.

(*w*) Cf. the later provisions of 1 K. & E. (13th edn.), p. 556, f. 6.

(*x*) See such cases as *Gaved* v. *Martyn*, 19 C. B. (N.S.), pp. 758-9; *Ivimey* v. *Stocker*, L. R. 1 Ch. 406; *Schwann* v. *Cotton*, [1916] 2 Ch. 120, 459; *Arkwright* v. *Gell*, 5 M. & W. 203.

a watercourse is perhaps hardly a receptacle into which a man can put water for his own private use, so as to make it his property, anyway as against the owner of the other end of the watercourse. As against third parties, it is a different question. It seems reasonable that A, owner of a reservoir with a pipe-line leading to B's property which A is under an obligation to supply, should be able to say to C that he filled the reservoir for his own private use, namely, to supply his own property and fulfil his obligation to B. If not, he could, of course, grant a good easement to come and fetch water from the reservoir (provided this did not interfere with B's supply); then if A's property and B's come into the same ownership, does C's easement (which is a right not in the water system, but of access to it) prevent that system being a receptacle into which its owner can place water for his private use, or is that easement, by this unity of ownership of the servient with another tenement, suspended or destroyed? Neither result seems reasonable, and the inference is that A could not grant the right to C as an easement.

CONDITIONS OF SALE OF LAND.

By E. O. Walford, LL.D., Solicitor.

(*Continued from p.* 163.)

Law Society's Condition.

Identity and Matters arising on the Particulars.

17.—(1) No objection shall be made on account of any discrepancy between old and present measurements in regard to which a reasonable explanation is furnished by the vendor.

(2) A purchaser shall be entitled—

(a) to such evidence of identity, if any, as may be gathered from the descriptions in the documents abstracted, or in the register, filed plan, or general map at the land registry, and

(b) unless the land is registered with an absolute or good leasehold title, to a statutory declaration (if he so requires) that the property has for twelve years and upwards preceding the date of the contract, or from the date fixed for commencement of the title (whichever period is the shorter), been held and enjoyed in accordance with the title shown thereto; but any such declaration shall be prepared, made, approved and stamped at the expense of the purchaser requiring it.

Save as aforesaid, no further or other evidence shall be required as to the identity of the property described in the contract, with the property to which title is shown by the abstract or registered title.

(3) Provided that the general boundaries can be sufficiently indicated, the vendor shall not be required to define the exact boundary line where the same passes along or near to any wall, hedge, fence or ditch, or to distinguish between—

(a) the parts of the property held under different titles,

(b) freehold land, enfranchised land, and leasehold land, where any such lands are adjoining or intermixed.

(c) lands parcel or formerly parcel of different manors.

(4) Where the property consists of or includes a manor or lordship, or reputed manor or lordship, the vendor shall not, save to the extent of the information in his possession, be bound to show the boundaries thereof, or to state the rights or incidents belonging thereto.

(5) A purchaser shall be deemed to purchase with full notice of the actual state and condition of the property, whether as to quantity, state of repair, means of access, enjoyment of light and air or otherwise howsoever, and shall take the same as it stands.

In the absence of stipulation where the description of the property in the title deeds differs from the description in the contract the purchaser is entitled to evidence establishing that the title deeds comprise the property sold: *Flower* v. *Hartopp* (1843), 6 Beav. 476. In a case in which the description in the court rolls of copyholds was very vague it was held that the title could be forced on the purchaser, as it is general knowledge that such descriptions are somewhat vague: *Long* v. *Collier* (1828), 4 Russ. 267. It does not seem clear that this decision would apply to freeholds. If the description of the property in the deeds differs materially from the description of the property agreed to be sold, a condition debarring the purchaser from requiring "further evidence" of the identity of the property sold with that described in the deeds will not entitle the vendor to a decree of specific performance if there is a substantial difference between the respective descriptions of the property in the contract and the deeds: *Flower* v. *Hartopp*, *supra*. The same rule applies if it is impossible to tell whether the title deeds do in fact show title to the particular parcel of land sold: *Curling* v. *Austin* (1862), 2 Dr. & Sm. 129. There is a substantial difference between a condition debarring the purchaser from "requiring further evidence" and one which requires the purchaser conclusively to assume identity upon specified evidence. In the former case the understanding is that the deeds will in fact show the identity, and if this is not so a good title is not shown: *per* Kindersley, V.-C., in *Curling* v. *Austin*, *supra*. The result is that the purchaser cannot require further evidence (being bound by the condition); but the vendor cannot obtain specific performance (not having deduced a good title). On the other hand, *Nicoll* v. *Chambers* (1852), 11 C. B. 996, illustrates the superior force of

a condition which states that the documents shall be *conclusive* evidence of identity, coupled with a statement that the quantity is to be taken as stated in the contract although the title deeds state the quantity to be less. Here the purchaser was advised of the specific flaw which the condition covered, and was accordingly bound by the condition. It would seem from the case law that there is little, if any, difference in effect between a condition debarring the purchaser from requiring evidence and one which stipulates that he shall accept as conclusive evidence of identity of the land sold with that described in the deeds, unless the description in such deeds or any discrepancy therein is also stated. The obligation of the vendor is to produce to the purchaser the land sold and if the title deeds do not comprise the whole of that land no condition in general terms will be of any avail. At least the nature of the defect must be disclosed, though not necessarily its extent: *Nicoll* v. *Chambers*, *supra*.

Condition 17 (1).

If the contract relates to a plot of land with a frontage of, say, 210 feet, and an earlier title deed shows a frontage of, say, 190 feet, but the later deeds and the contract show the frontage as 210 feet, the vendor may nevertheless furnish a reasonable explanation. Thus, he may, if he can prove that the plan on the earlier deed shows as the boundary on one side a building existing at the date of the earlier deed and still standing, and on the other side a road existing both at the date of the earlier deed and at the date of the contract, it follows that the measurement in the plan on the earlier title deed is incorrect. An error in the plan will not, however, prevent the whole of the land shown on the plan from passing, and if the general description in the deed is sufficient to include a part omitted from the plan, the conveyance will pass that part unless it is stated that the plan is to control the general description: *Willis* v. *Watney* (1881), 51 L. J. Ch. 181. Where land was conveyed with specified boundaries as appears "by the diagram framed by the surveyor", it was held that as to any discrepancy between the diagram and the description in the parcels, the latter prevailed: *Horne* v. *Struben*, [1902] A. C. 454. It is not, however, a "satisfactory explanation" of a shortage that although the general description and the plan do not include the parcel of land in question that parcel has in fact always previously been occupied together with the remainder of the land, for such evidence is not admissible, the deed being conclusive: *Barton* v. *Dawes* (1850), 10 C. B. 261. Similarly, land was described in a conveyance as "marked in the plan as 153b

containing 34 perches ", and 153b as marked off from 153 contained according to the scale on the plan 27 perches. It was held that only the 27 perches passed although the result was to omit from the conveyance a piece of frontage which together with 153b would have made up the 34 perches, and this notwithstanding the fairly clear inference that this frontage was intended to pass: *Llewellyn* v. *Earl of Jersey* (1843), 12 L. J. Ex. 243; 11 M. & W. 183. It must be emphasised that the wording of the " parcels " and the terms of reference to the plan must control the situation. So long as the general description shows what is intended to be conveyed, the addition of measurements or areas which are incorrect will not limit or extend the area included in the conveyance. Thus, if A conveys *all* his house and grounds known as Haslemere, Blankford, containing ten acres, but which in fact extends to twenty acres, the whole twenty acres will pass (*Llewellyn* v. *Earl of Jersey*, *supra*), subject to any further particular description which does not extend to the whole of the property, in which case only those parts included in the particular description will pass: *Griffiths* v. *Penson* (1863), 9 Jur. (N.S.) 385. The purchaser will not be able to use in evidence the terms of the contract between a previous vendor and purchaser to show what passed by the conveyance : *Williams* v. *Morgan* (1850), 15 Q. B. 782; and cannot therefore accept as satisfactory any explanation of a discrepancy in the measurements in the deeds or plans thereon which is based on the fact that the contract between A and B included land which was not in fact included in the conveyance to B (the vendor, or his predecessor in title).

Condition 17 (2).

Under this paragraph the purchaser is merely prevented from calling for further evidence. If he can show that the title deeds abstracted do not deal with the property sold the condition is of no avail. The parties contract on the basis that the title to be deduced is that relating to the land sold. It will, however, be seen that the vendor does not in any way warrant that the deeds will establish identity, the condition referring to " evidence of identity, if any ". The purchaser is therefore given notice that it may be impossible to identify from the abstracted documents the land sold. Without the additional provision as to a statutory declaration it is doubtful if specific performance could be obtained by the vendor in a case where the deeds furnished no evidence of identity (*vide Curling* v. *Austin*, *supra*). As to the statutory declaration to be furnished under paragraph (2) it will be seen that if the title commences with a deed thirty or twenty-five years

old the purchaser cannot require a statutory declaration going back to that date; but only for a period of twelve years prior to the date of the contract. It may well be that the difficulty in establishing identity arises in connection with one of the older title deeds, and in that case this paragraph will be of little assistance to the purchaser.

It appears that notwithstanding a provision making a statutory declaration "sufficient evidence" of identity the purchaser may insist upon better evidence being furnished by the vendor if he is able to supply it, together with a statutory declaration by the vendor that the declaration offered is the best evidence which he can give: *Bird* v. *Fox*, 11 Hare 40. And see *Conveyancer*, June, 1937, p. 298, as to requisite contents of a statutory declaration as to title.

Condition 17 (3).

As by this condition the vendor is not required to do more than define the general boundaries, without defining the exact boundary line, the purchaser will be unable to require the vendor to define the ownership of boundary walls, fences, hedges or ditches. The term "general boundaries" does not appear to have any special legal significance; but no doubt a vendor defines the general boundary on any given side of the land by showing on a plan or referring to a wall, hedge, or other physical boundary. It appears that under the condition which we are now considering he then discharges his obligation and makes no warranty as to the ownership of the wall, hedge, etc. As to intermixed lands, the purchaser is entitled in the absence of express stipulation to require the vendor to show exactly what parcels are held under, say, freehold and leasehold tenure: *Monro* v. *Taylor*, 8 Hare 51; *Dawson* v. *Brinckman* (1858), 3 M. & G. 53. In *Monro* v. *Taylor* the property was described as partly freehold and partly leasehold, and it appears to have been decided on appeal that the purchaser could not require the precise boundary line to be defined: *Monro* v. *Taylor*, 3 M. & G. 713.

It is thought that at the present date questions will rarely arise upon sections (a), (b) and (c) of this paragraph, as the purchaser's solicitor will normally require the limits of the land of each particular tenure to be defined by the contract. See also Condition 31.

Condition 17 (4).

Here again the purchaser will generally obtain all available information before contract, and therefore the condition appears to

be reasonable. See also Condition 31, which materially affects the interpretation of this paragraph.

Condition 17 (5).

(a) *Quantity.*—Knowledge of the quantity of the land comprised in the contract would not be imputed to the purchaser solely on the ground that he knows the property : *Bellamy* v. *Debenham*, [1891] 1 Ch. 412, 420.

It is clear that this Condition does not compel, and is not intended to compel, the purchaser to accept land which is substantially less in quantity than the property agreed to be sold, as is made clear by the express provisions of the Law Society's Condition No. 31 (4), which operates in qualification of all the other conditions.

(b) *State of repair.*—This provision appears to be of particular importance in relation to leasehold property in conjunction with the concluding words of Condition 17 (5), *i.e.*, " and shall take the property as it stands ". See observations above under " Title to Leaseholds ".

(c) *Means of access.*—The purchaser's adviser should satisfy himself as to the means of access to the property which the purchaser expects to obtain, as clearly if there is no contract to grant a right of way the Court will not require the vendor to deduce title thereto : see *Curling* v. *Austin* (1862), 2 Dr. & Sm. 129, where the property was old and it appeared that a right of way was enjoyed in connection with it; but it was not referred to in the contract, and the Court refused to order deduction of the title. Specific performance will not, however, be ordered where there is no means of access at all, so that the purchaser cannot obtain possession or use of the land which he has purchased : *Denne* v. *Light* (1857), 8 D. M. & G. 774. Cf. *Union Lighterage Co.* v. *London Graving Dock Co.*, [1902] 2 Ch. 557, 573; *Pinnington* v. *Garland* (1853), 9 Ex. 1, as to the effect of a grant not expressly including a right of way, where the land is landlocked. Any implied right of way of necessity will only be such as is absolutely necessary for enjoyment of the land at the date of the conveyance. So where the surrounding land is agricultural, it would seem that the right of way could only be used for agricultural purposes : *London Corporation* v. *Riggs* (1880), 13 Ch. D. 798; cf. *Borman* v. *Griffiths*, [1930] 1 Ch. 493, at p. 499.

(d) *Enjoyment of light and air.*—Where there are buildings on the land in which windows have existed for upwards of twenty years the purchaser is not entitled to assume that the access of light thereto is enjoyed as of right. Nor, where the light has been enjoyed for less than twenty years, can the purchaser assume that

the statutory period is running for his benefit: *Greenhalgh* v. *Brindley*, [1901] 2 Ch. 324. Even if the vendor has entered into an agreement with the adjoining owner by which he has acknowledged that the access of light to the windows is enjoyed by the consent of the adjoining owner, he is not under any legal liability to disclose that agreement prior to contract, *Smith* v. *Colbourne*, [1914] 2 Ch. 533. Failure to disclose such an agreement will not prevent the vendor from obtaining specific performance, although the vendor *may* be deprived of his costs in such a case: *Greenhalgh* v. *Brindley* (*supra*). In *Smith* v. *Colbourne* (*supra*) it was argued that such agreement constituted an incumbrance, but this contention was rejected by the Court.

The moral is that the purchaser should, prior to contract, inquire as to all windows and lights in the premises whether the right of access of light thereto is enjoyed as of right and particularly whether any acknowledgment in writing has been given as to the enjoyment thereof by the consent of any other person.

If, however, the vendor has covenanted with the adjoining owner not to do anything on the land sold which will affect the access of light to adjoining premises the position is quite different, for such an agreement constitutes a restrictive covenant affecting the land sold, and if it is not disclosed the purchaser can rescind the contract. The authority for this proposition is *Pemsel* v. *Tucker*, [1907] 2 Ch. 191. In that case the facts were rather special. The defendant had sold to the plaintiff two houses "subject to right of light with owner of adjoining property being guaranteed". The houses were new. The adjoining property had been sold by the defendant a few years previously to X, the defendant and X entering into mutual covenants not to do anything to prejudice the light coming to the windows on the property of the other. The plaintiff claimed that this constituted a defect in the title. The case was decided in favour of the plaintiff on the principle above stated.

Law Society's Condition.

QUIT RENTS, EASEMENTS, ETC.

18.—(1) The property is sold and, except where the title is registered, will, if the vendor so requires and defines the liability, be conveyed subject to all quit, chief and other rents (being incidents of tenure) remaining unextinguished, rights of way, water, light, drainage, and other easements, rights and privileges, if any, affecting the same, and to any subsisting liability to repair party walls, fences, roads or streets:

Provided that nothing in this condition shall discharge the vendor from the obligation to disclose, on or before the date of the contract, the existence of all latent easements, rights, privileges or other liabilities which are known by him to affect the property.

(2) No inquiry shall be made as to the origin or creation of any quit, fee farm, or chief rent (being an incident of tenure) subject to which the property is sold.

(3) Where a receipt for any such rent is produced, no evidence (other than such, if any, as is in the possession or control of the vendor or his trustee or mortgagee) of the title to give such receipt shall be required.

Condition 18 (1).

It will be seen that this condition only applies to latent easements, rights, privileges or other liabilities of which the vendor is aware, if the vendor has disclosed them. For, if the vendor has not disclosed them he will be debarred by the proviso from claiming the benefit of this paragraph.

In *Ashburner* v. *Sewell*, [1891] 3 Ch. 405, the vendor sold freehold property subject to a condition precluding the purchaser from rescinding on account of errors but providing for compensation in respect of such errors; but there was no provision that the property was sold subject to all easements affecting it. There was in fact a right of way over the property, and it was held that this was not an error within the condition relating to compensation, but a defect in title. In this case the vendor was fortunate enough to escape from the situation by exercising his right of rescission, on account of the requisition of the purchaser demanding compensation. Compare on this point *Mawson* v. *Fletcher* (1870), L. R. 6 Ch. 91.

The earlier decisions are somewhat clouded by the distinction between cases in which the purchaser has been held to be bound at common law, and thus, prior to 1926, unable to recover the deposit, and those in which specific performance has been refused. It appears that it may now be stated in general terms that the vendor is bound to disclose specifically all latent easements or liabilities of which he is aware, under penalty of rescission by the purchaser at his option if the result is that the purchaser will get something substantially different from that for which he contracted. Thus an underground watercourse is a latent defect, but the discovery of such a watercourse will not entitle the purchaser to rescind the contract unless the result is

that the purchaser is not getting substantially what he bargained for: *Shepherd* v. *Croft*, [1911] 1 Ch. 521; otherwise specific performance with compensation would be decreed, *ibid.* On the other hand if the purchaser had informed the vendor that he required the land for building, and the result of the watercourse would be to prevent him from building on the land, then the purchaser could rescind: *Re Puckett and Smith*, [1902] 2 Ch. 258; *Shackleton* v. *Sutcliffe* (1847), 1 De G. & S. 609. Cf. *Dykes* v. *Blake* (1838), 4 Bing. N. C. 463, as to a right of way being an essential defect where the land is required for building. Specific performance with compensation was considered to be allowable in a case where the land was not sold for building, and there was a public sewer under it: *Re Brewer and Hankin* (1899), 80 L. T. 127. In that case the property was subject to a deed of mutual covenants which prevented the erection of any buildings on the land. In *Pemsel and Wilson* v. *Tucker*, [1907] 2 Ch. 191, where there was also a sewer on the land, it was held that as the sewer was vested in the local authority the vendor could not make a good title as he could not convey all that he had contracted to sell. The fact that the sewer was vested in the local authority also appeared in the case of *Re Brewer and Hankin*, *supra*, but it will be seen that the decision was not affected thereby. The true test is whether the purchaser will really get something quite different from that which he contracted to purchase, as appears from the following recent case. A bought a freehold dwelling-house under a contract incorporating the General Conditions of Sale, 1925, of the Law Society. A subsequently found that two sewers, vested in the local authority, and known by the vendors to exist, ran along the east side and the back yard of the property. It was decided that although the failure to disclose the sewers materially affected the description of the property, yet the result of compelling specific performance would not be to force on the purchaser something substantially different from that which A had agreed to purchase, having regard to the fact that A could still use the property, as apparently intended, as a private dwelling-house, and that accordingly the contract could be performed subject to compensation under the General Condition applicable: *Re Belcham and Gawley*, [1930] 1 Ch. 56. It is also considered that the Court would now in any case where the purchaser's right to rescind was upheld order the return of the deposit, in exercise of the power conferred upon it by section 49 of the Law of Property Act. If the rule is too widely stated above, it is clear that the modern decisions tend very strongly to support this view. In *Yandle* v. *Sutton*, [1922] 2 Ch. 199, there was an open track across the land, its character giving

no certain indication whether it was a public or a private right of way for the use of the occupiers of the land. It was in fact a public right of way. It was held that this was not a patent defect, and the vendor could not obtain specific performance, the Court laying down the rule that to constitute a patent defect the defect must either be visible to the eye or arise by necessary implication from something visible to the eye. As to patent defects, however, it is well settled by a long line of authority that where such defects are observable on inspection of the property the purchaser takes with knowledge of them : *Oldfield* v. *Round* (1800), 5 Ves. 508; *Lowndes* v. *Lane* (1789), 2 Cox Eq. Cas. 363.

It is in any case extremely precarious for a vendor to rely upon general provisions as to rights of way and other easements, as is illustrated by the following case. Two adjoining freehold properties were offered for sale, Lot 2 being a hotel and Lot 3 a house. The access to the hotel was by a carriage drive. The access to the house was by a sweep opening into the carriage drive. Each property was subject to a lease, the lease of the hotel reserving a right over the carriage drive for access to the house. No mention was made in the particulars of this right of way, although on the sole plan, which it was stated should be no part of the contract, the position as to the access to the house was clear. The conditions of sale, which were carefully and strictly drawn, provided that the purchaser should take subject to all easements whether or not mentioned in the particulars or sale plan, and as to any easement not disclosed such non-disclosure was to be deemed to be an omission or error within the meaning of another condition. That other condition in turn provided that any error or omission should not annul the sale nor should any compensation be allowed either to vendor or purchaser. The purchaser of the hotel desired to build over the carriage drive, and required a conveyance free from any reservation. The vendors claiming specific performance with the reservation of the right of way to the house forming the other lot, the Court held that there was no patent defect, and that the condition as to errors only applied to matters which were unknown to the vendors. The purchaser had made no requisition as to the right of way; but it was decided that he was not obliged to do so, as the abstract furnished disclosed a freehold title free from any right of way. Accordingly the purchaser succeeded in his counterclaim for rescission and return of the deposit.

Condition 18 (2).

It will be seen from Condition 18 (1) that the vendor is required to define the liability if he wishes a reference to any quit rent,

chief rent or other liability to be inserted in the assurance of the property. It has been held that where the condition states that the property is sold and will be conveyed subject to all quit rents and easements, if any, without any obligation upon the vendors to define such quit rents or easements, the vendor can require that the conveyance should contain similar general words, even if the vendor is unaware of any such matters: *Gale* v. *Squier* (1877), 5 Ch. D. 625.

It is clear that in the absence of any condition the vendor is unable to compel the purchaser to accept a property subject to a chief rent or quit rent *without compensation*, as under an open contract he must convey the freehold free from incumbrances. Generally quit rents are small and the rule is that the purchaser cannot, under an open contract, rescind on account of the existence of a quit rent, "probably because they are incidents of tenure", as Leach, V.-C., said in *Esdaile* v. *Stephenson* (1822), 1 S. & St. 122. It will be seen that Condition 18 relates only to rents which are incidents of tenure. Rentcharges must, of course, be disclosed, and it is clear that substantial rentcharges are essential defects entitling the purchaser to rescind (*Portman* v. *Mill* (1826), 1 Russ. & M. 696), although a small rentcharge is probably not an essential defect, and performance of the contract will be decreed (see *Esdaile* v. *Stephenson*, *supra*), but compensation will, of course, be payable by the vendor. In *Portman* v. *Mill* the rentcharge was several hundred pounds per year; but in the case of a rentcharge of about £20 per year affecting the land sold and other land which was sufficient to bear the whole of the rentcharge, the defect was held not to be essential, it being considered that the other property would be the first to which resort would be made for the rentcharge: *Halsey* v. *Grant* (1806), 13 Ves. 73.

Condition 18 (3).

It would not be usual to require the vendor to obtain deduction of the title of the person purporting to give a receipt for a chief rent or quit rent affecting the property. Generally, the vendor would be unable to do so. The practice is in accordance with this paragraph.

Law Society's Condition.

LAND TAX AND TITHE RENTCHARGE.

19.—(1) The property is, unless otherwise stated in the contract, sold subject to all land tax or tithe rentcharge (if any) affecting the same.

The vendor shall not be required to obtain any apportionment thereof, and the receipts for the last amounts due in respect of the same shall be sufficient evidence of the amounts.

(2) Where in the contract it is stated that any tithe rentcharge or land tax is apportioned for the purposes of the sale, a purchaser shall accept such apportionment, and be liable to keep indemnified the other property affected from the apportioned amount, and the vendor or the persons deriving title under him, being the owners of the other property, shall be liable to keep indemnified the property sold from the remainder of such tithe rentcharge or land tax until a legal apportionment is effected.

(3) Where the property is stated in the contract to be free from land tax or tithe rentcharge, such freedom shall be deemed to be sufficiently established, if the land tax assessment books, or the tithe commutation award (if any), as the case may be, do not show any land tax or tithe rentcharge to be payable, or by the absence of any such books or award; but a purchaser shall be furnished at his own expense, if he so requires, with a statutory declaration by a competent declarant that no land tax or tithe rentcharge (as the case may be), has been paid for twelve years and upwards next before the date of the contract, or for the period to which the abstract relates, whichever is the shorter.

(4) This condition shall apply to any terminable redemption annuity payable in lieu of tithe rentcharge in like manner as it applies to tithe rentcharge.

Land tax.

Upon the sale of freehold property free from incumbrances the purchaser is not entitled to require that any land tax affecting it shall be redeemed by the vendor, as land tax (like property tax and other taxes and rates), is deemed to be a normal incident of tenure of land : see *Williams on Vendor and Purchaser* (3rd ed.), pp. 164, 670. Application may be made to the Ministry of Agriculture for apportionment of tax on the sale of any part of the land comprised in an assessment and for redemption thereof. The redemption is made by payment of a capital sum or instalments under the Finance Act, 1896. Strict proof of redemption consists of production of the certificate of redemption, coupled with the receipt issued by the Bank of England (Land Tax Redemption Act, 1802, s. 38); but in practice the certificate alone is accepted

as sufficient evidence. Where property is sold free from land tax strict proof of redemption can therefore be required in the manner last mentioned. The condition now under consideration provides for other evidence. Generally, however, a direct inquiry at the office of the local inspector of taxes will be the quickest and most practical method of dealing with the matter from the viewpoint of the purchaser. As to the statutory declaration contemplated by Condition 19 (3) possibly the collector may be able and willing to make such a declaration in some cases; but otherwise it will probably be difficult to obtain a suitable declaration. The vendor would probably not be a "competent declarant": see *Hobson* v. *Bell* (1839), 2 Beav. 17.

Tithe rentcharge.

Prior to October 2, 1936, on which date the Tithe Act, 1936, came into operation, tithe rentcharge, like land tax, was considered to be a normal incident of tenure of land. Accordingly the vendor was under no obligation to disclose it: *Ebsworth* v. *Tidy* (1889), 42 Ch. D. 24.

By section 1 of the Tithe Act, 1936, it is provided, however, that all tithe rentcharge shall be extinguished as from October 2, 1936. Section 3 of the Act substitutes for tithe rentcharge a redemption annuity which is to be charged on the land in favour of the Crown for sixty years. Redemption stock is to be issued for the compensation of the owners of the tithe rentcharge extinguished by the Act (section 2). The most important point to be noted is that by section 13 a tithe redemption annuity unlike tithe rentcharge is declared to be an incumbrance for the purpose of section 183 of the Law of Property Act, 1925. The Law Society has drawn attention in its Gazette to this provision, and to the necessity for disclosing on all sales of land after the coming into force of the Tithe Act, 1936, any tithe redemption annuity affecting the land. The Law Society has drawn particular attention to the penal provisions of section 183 of the L. P. A., 1925, and it may therefore be useful to indicate the short effect of that section. It provides that where any person disposing of property or any interest therein for money or money's worth, or his solicitor or agent with intent to defraud conceals from the purchaser any instrument or incumbrance material to the title he is guilty of a misdemeanour punishable by fine or imprisonment for a term not exceeding two years or both. It will be seen that if there is no intention to defraud no liability arises. It is comforting to reflect that practitioners will not be liable to fine or imprisonment unless there is "intent to defraud", and that the leave of the Attorney-

General to any prosecution is necessary (section 183 (5)). The purchaser is also entitled to damages for any loss sustained by the concealment (section 183 (2)).

It will be clear from the foregoing observations that a mere statement in general conditions that the property is sold subject to any tithe redemption annuity affecting the land will not be sufficient if the land is known to be subject to such a liability. The proper course is to state the liability if known or otherwise to state :—

(a) That the land is sold free from any such liability (if tithe has been redeemed); or

(b) That the land is sold subject to any subsisting liability in respect of tithe redemption annuity, but the vendor is not aware of any such liability.

A prudent purchaser will no doubt search, or possibly may insist on the vendor doing so, in cases where the vendor has purchased the property recently and is therefore unable to certify that there has been no demand for tithe rentcharge or tithe redemption annuity for, say, the past twelve years.

Other matters arising under the Tithe Act, 1936, are as follows :—

(1) Upon the sale of freehold interests or leasehold terms granted for more than fourteen years at less than a rack rent, or the grant of such leases affecting land subject to tithe redemption annuity, the vendor or lessor is required to furnish to the Tithe Redemption Commission particulars in the form prescribed in the Redemption Annuities Rules, 1936 and 1937. The particulars must be furnished whether the whole or only part of the land affected by an annuity is comprised in the dealing : section 18 (9).

(2) Such annuities are not registrable as land charges under the Land Charges Act, 1925, but are overriding interests within the meaning of section 70 (1) of the Land Registration Act, 1925.

According to the old decision of *Todd* v. *Gee* (1810), 17 Ves. 273, a vendor who has sold "tithe free" will not be compelled in proceedings for specific performance to purchase the tithe in order to convey the land to the purchaser free from tithe. Under section 50 of the Law of Property Act, 1925 (replacing section 5 of the Conveyancing Act, 1881), the Court has power, where there is any incumbrance affecting the land, to order the payment into Court of a sufficient sum, as thereby fixed, and thereupon to declare the land freed from the incumbrance. In *Re G. N. Ry. and Sanderson* (1884), 25 Ch. D. 788, it was laid down that this

statutory power would not be exercised where it would occasion hardship to the vendor. It was further suggested in the same case that this section had no application to rentcharges arising under a statute unless the persons entitled to the rentcharge consent; but this seems doubtful: see *Wolstenholme's Conveyancing Acts*, 9th edition, p. 30, and note that there is no "limiting" definition in C. A., 1881, s. 2 (vii), or L. P. A., 1925, s. 205 (1) (vii), but only a reference to specific mortgages and charges which are "included" in the term "incumbrance".

It is suggested that in the case of a tithe redemption annuity very small in comparison with the purchase price, the Court would probably operate under the section on application by the purchaser; but the difficulty is to fix the border-line where hardship to the vendor may arise. In *Re Great Northern Ry. and Sanderson* (*supra*) the purchase price was £868 and the rentcharge (not a tithe rentcharge) was £63 per annum, and so the redemption money would have been more than twice the purchase price, so that the hardship was obvious. It is deducible from the same decision that "hardship" does not depend upon whether the vendor is financially able to meet the liability, as the vendor in that case was a railway company. In the later case of *Re Simpson and Moy* (1909), 53 S. J. 376, the Court refused to order the vendor to discharge a yearly rentcharge of about £5 affecting a property which had been sold as freehold without disclosing any incumbrance. In both *Re G. N. Ry.* and *Re Simpson* the contract contained a provision enabling the vendor to rescind on delivery of requisitions with which the vendor was unwilling to comply, and this right was successfully exercised. Reference has already been made to the position where rentcharges (other than tithe rentcharge) affect the land sold.

Where land is sold tithe free it was treated as settled law in the case of *Smith* v. *Tolcher* (1828), 4 Russ. 302, that specific performance could not be enforced by a vendor if it were in fact subject to tithe. This decision was, however, long prior to the Conveyancing Act, 1881 (see section 5 of that Act, *supra*), and to the Tithe Act, 1936, and it would seem that in such cases a vendor desiring to enforce specific performance would simply redeem the tithe annuity under the Tithe Act, 1936. The purchaser's right to enforce specific performance in such a case must depend upon the question of "hardship" considered above.

In the Irish case of *Re Ryan* (1868), Ir. R. 3 Eq. 255, it was held that the statement of the "probable" amount of tithe as £9 18s. 5d., when it was in fact ten shillings more, did not entitle the purchaser to any compensation.

It does not appear to be settled whether under an open contract

the purchaser is entitled to require the vendor to obtain a legal apportionment when the land sold is subject with other land to tithe rentcharge. It seems that he is so entitled (*Re Ebsworth and Tidy* (1889), 42 Ch. D. 24 (at p. 50)) if the vendor owns the whole of the land in the apportionment; but not if the other land belongs to a third party.

With regard to the provision in the Law Society's Condition as to a statutory declaration as to payment of tithe, it will generally be found simpler and more expeditious to make the appropriate search at the Ministry of Agriculture and Fisheries.

Law Society's Condition.

LOCAL AUTHORITY'S REQUIREMENTS, LAND CHARGES AND TOWN PLANNING SCHEMES.

20.—(1) Where before the date of the contract—

(a) the vendor has notice of any requirement enforceable by any local or public authority and involving the expenditure of money in respect of the property, or

(b) any local land charge affecting the property has been registered under the Land Charges Act, 1925,

then (unless the property is expressly sold subject to the requirement or charge) the vendor shall keep the purchaser and the property indemnified against all liability in respect of any money payable or to become payable for the purpose of satisfying the requirement or charge, and if the same is not shown to have been satisfied before completion of the purchase the vendor shall in the conveyance give a covenant for such indemnity.

(2) Where notice of any such requirement is received by the vendor, or any such local land charge is registered, after the date of the contract, then—

(a) if before completion of the purchase the vendor has expended money for the purpose of satisfying the requirement or charge (either wholly or in part) the purchaser shall on completion of the purchase repay to the vendor the money so expended by him, with interest thereon at the rate of £5 per cent. per annum from the date of the expenditure thereof, and

(b) if and so far as the requirement or charge has not been

satisfied before completion of the purchase the purchaser shall keep the vendor indemnified against all liability for the payment of any money payable, or to become payable, for the purpose of satisfying the requirement or charge, and the property shall be conveyed subject to the liability under the requirement or charge, and the purchaser shall in the conveyance give a covenant for such indemnity:

Provided that the vendor, before expending any money as aforesaid, shall inform the purchaser of the requirement or charge and shall give him the option of satisfying the same and all proper facilities for so doing.

(3) Where the property is subject—

(a) to any planning scheme under the Town Planning Act, 1925, or the Town and Country Planning Act, 1932, or any Act amending or substituted for the last-mentioned Act, or to any resolution under any such Act to prepare or adopt any such scheme; or

(b) to any order made under any such Act in relation to the development of estates or building operations; or

(c) to any restriction as to the height of any building, wall, fence or hedge, or to any prescription of a building line or improvement line imposed or made by or under the Roads Improvement Act, 1925, or the Public Health Act, 1925, or any Act amending or substituted for either of those Acts, or by or under any local or private Act—

then and in any such case any sum of money payable in pursuance of such Act by or to any local or public authority in respect either of the injurious affection or of the increase in value of the property or otherwise in relation thereto, shall be receivable or payable by the purchaser, and he shall keep the vendor indemnified against any liability to make any such payment, and shall in the conveyance give a covenant for such indemnity.

It is not practicable here to deal with all types of notice which may be served by a local or other public authority; but as notices in connection with road-making are of very frequent occurrence it may be desirable to consider the position which arises under an

open contract where such a notice has been served before the date of the contract, or after that date and before completion.

In every case the particular statute under which the authority is operating must be considered; but generally it will be found that the notice is served under the Public Health Act, 1875, the Metropolis Management Amendment Act, 1862, or the Private Street Works Act, 1892.

As to works executed by a local authority pursuant to a notice served under section 150 of the Public Health Act, 1875, the expenses become charged upon the property on the completion of the work: *Re Allen & Driscoll*, [1904] 2 Ch. 226. In that case it was argued that there was an inchoate liability from the moment when the notice was served. The Court, however, refused to accept this view. It therefore follows that if before the time at which the purchase is due to be completed works have been executed by the authority following upon such a notice the vendor must pay the expenses of those works (see *Re Bettesworth* (1888), 37 Ch. D. 535); but as a mere notice to the vendor creates no liability the service of such a notice prior to the date for completion does not saddle the vendor with liability to comply with it at his own expense, if the work remains unexecuted at the date for completion: *Re Allen & Driscoll* (*supra*). In *Stock* v. *Meakin*, [1900] 1 Ch. 638, street works had been executed by a local authority under the Private Street Works Act, 1892. Here, again, the charge was held to arise on the completion of the works which had actually taken place before the date of the contract, although the demand for payment was served after completion of the purchase. It was laid down that the vendor was liable on two grounds:—

(a) The expense constituted an "outgoing" under the condition which required the vendor to discharge outgoings up to the date fixed for completion.

(b) The covenant implied by the conveyance of the land "as beneficial owner" extended to incumbrances, claims or demands suffered by the vendor, notwithstanding that the liability arose under a statute, and the date for payment was subsequent to the completion of the contract. It was suggested by Coleridge, C.J., in *Midgley* v. *Coppock* (1879), 4 Ex. D. 309, a case arising under a local Improvement Act, that the reference to the apportionment of outgoings "if necessary" in a condition of sale showed that the condition requiring payment by the vendor of the outgoings up to the date fixed for completion extended to outgoings which could not be apportioned. In that case neither party

was aware of the subsisting charge; but the result was identical with that in *Stock* v. *Meakin* (*supra*).

As to works executed pursuant to the Public Health Act, 1875, after the completion of the purchase, the purchaser is liable *vis-à-vis* the authority as the "owner" (section 257). The vendor cannot be sued by the authority because the section only gives the authority the right to recover the expenses from "the owner of such premises when the works are completed".

The position under the Metropolis Management Act, s. 77, is different, for in that case the expenses are recoverable by the authority from the "present or any future owner". Moreover, these expenses are not a charge on the property, so that the purchaser derives no benefit in this respect from the implied covenant arising from the conveyance of the property by the vendor "as beneficial owner": *Egg* v. *Blaney* (1888), 21 Q. B. D. 107.

Section 15 of the Land Charges Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, provides that where any sum is recoverable by a local authority under the Public Health Acts, the Metropolis Management Acts, or the Private Street Works Act, 1892, or any similar statute from successive owners, then whether or not the statute expresses that sum to be a charge on the property it is for the purpose of that section to be deemed to be a charge. This, however, only means that it is a charge registrable as a "local land charge", and not a charge in the nature of a mortgage or incumbrance. As will be seen from later observations, the existence of a registered local land charge will not necessarily enable the purchaser to refuse to complete the purchase or entitle him to any compensation. Before dealing with this point it should perhaps be mentioned that if the authority does not enter the necessary land charge in its register before completion of the purchase, the charge is void against a purchaser for valuable consideration of any legal estate in the land: Land Charges Act, 1925, s. 15 (1). Where a local authority has resolved to prepare a town planning scheme and has effected the necessary registration under the Land Charges Act, 1925, the purchaser cannot found an action upon the implied covenant, because the effect of the registration is only to create a possible interference with the property: *Re Forsey & Hollebone*, [1927] 2 Ch. 379. The decision in that case proceeded on the footing that the registration of the resolution was not so much to impose restrictions on the land as to prevent unreasonable demands being made by persons buying land subject to the scheme, and there was nothing making the property different from that which was contracted to be sold. Even if the registered resolution was an incumbrance, said Eve, J., and the Court of Appeal, the

purchaser must, under section 198 of the Law of Property Act, 1925, be deemed to have contracted with actual notice of it, and was therefore precluded from refusing to complete the purchase. On this footing, even if the scheme had been actually prepared and finally approved by the Minister of Health, the purchaser would still take with notice of it, and the result would be similar. It is not, however, clear from the decision of the Court of Appeal in the case just mentioned that this is so; and it may well be, where the result of an approved scheme is substantially to restrict the user of the land, that the Court will refuse to force the title upon a person buying under an open contract. Mr. Justice Eve appears himself to have had some misgivings regarding the proposition that the Law of Property Act, 1925, s. 198, which makes registration of a land charge actual notice "to all persons and for all purposes connected with the land affected", was sufficient to saddle all the world with notice, for in *Coles* v. *White City* (*Manchester*) *Greyhound Association* (1929), 45 T. L. R. 230, his Lordship refused to hold that intending purchasers of shares in a company formed to establish a greyhound course were fixed by this section with notice of a town planning scheme under which the company might have been prevented from setting out the course, with the result that the value of the shares was very seriously affected. There is, of course, a technical distinction between a contract for the purchase of shares in a company owning land and a contract for the direct purchase of an interest in land; but the words of section 198 seem to apply with equal force to both cases if construed literally.

Pending a definite decision upon the point it is open to doubt whether a purchaser under an open contract without express notice of a scheme approved by the Minister and constituting a substantial interference with the user of the land would be compelled specifically to perform the contract (although saddled with "actual notice" of the scheme by section 198).

It is, however, clear that where property is purchased for development or with the object of converting it to some other use search should be made in the local land charges registry before exchange of the contract. It is essential generally that application should be made for official search certificates not only of the local authority but also of the county council in respect of land charges registered in their respective registers.

The material provisions in relation to the registration of local land charges are contained in section 15 of the Land Charges Act, 1925, as amended by the Schedule to the Law of Property (Amendment) Act, 1926, and, for our present purposes, may be summarised as follows:—

(a) Local land charges are charges acquired by local authorities (including county councils) under the Public Health Acts, the Metropolis Management Acts, the Private Street Works Act, 1892, or under any similar statute, and must be registered by the authority, and will be void against a purchaser for money or money's worth of a legal estate in the land affected unless so registered before completion of the purchase.

(b) Any sums recoverable by the authority under any such Acts from the owner (or occupier) for the time being of the land affected are to be deemed to be a charge on the land, although not expressed by the relevant Act to be so charged.

(c) Registration by the proper officer of the local authority takes the place of registration at the Land Charges Registry.

(d) Town planning schemes and resolutions for such schemes are registrable as local land charges.

According to the provision contained in section 15 (7) of the Land Charges Act, 1925, any resolution for the preparation of a town planning scheme was declared to be a restrictive covenant. However, this provision was not repeated in the new sub-section 7 substituted by the Law of Property (Amendment) Act, 1926. What, then, is the position if there is a local land charge registered in connection with a proposed or existing town planning scheme? By virtue of section 198 of the Law of Property Act, 1925, the purchaser has notice of all registered land charges, and therefore cannot complain unless he can show in some way that the vendor is bound to get the land discharged from the scheme, or can establish to the satisfaction of the Court in proceedings for specific performance that it would be inequitable to enforce the contract (a doubtful matter). The result is that the purchaser should either obtain a warranty that there are no notices from any authority outstanding and no local land charges registered against the property, or make the usual land charges search and inquiries prior to contract.

Condition 20 (1).

Turning now to the Law Society's Condition 20, set out above, it will be seen that as to requirements enforceable by any local or public authority and local land charges registered under the Land Charges Act, 1925, the only obligation of the vendor is to keep the purchaser and the property indemnified against any moneys payable to satisfy the requirement or charge. In practice, however, as in most cases the owner for the time being of the property will be under direct liability to the authority (even if the moneys

payable are not actually charged upon the property), an indemnity is generally an insufficient security to the purchaser. For example, where a new house fronting a road not taken over by the local authority is being purchased upon the footing that the road charges are to be discharged by the vendor the only satisfactory indemnity which the purchaser can obtain is the deposit with responsible persons of a sum of money sufficient to cover the sum ultimately payable. A reasonable estimate can generally be made without difficulty. There are of course exceptional cases in which the vendor's covenant for indemnity may safely be accepted, *e.g.*, where the vendors are trustees of a large and wealthy estate or a bank or a well-established insurance company; but in normal cases it is submitted that either a suitable deposit should be made, on the lines above indicated, or if this is refused, that the attention of the purchaser should be drawn to the fact that the value of the indemnity depends on the financial stability of the vendor, possibly over a period of years. This last point applies whether the expense is one which cannot be accurately ascertained because the works have not yet been executed, or is one which is already due to be met.

In the first of these two cases the liability of the vendor to pay the amount in question will only fall to be discharged when the works are completed, possibly many years hence. Again, if the authority then resolves that the expenses payable be accepted by (say) eight yearly instalments, it would seem to be arguable that the vendor keeps "the property and the purchaser indemnified" against liability by discharging the yearly instalments as they become due. The risk to the purchaser is therefore substantially increased even where the vendor's financial position is strong at the date of the sale. It is suggested that where any such potential liability exists, and the purchaser is forced to rely upon an indemnity alone, the Law Society's Condition should be amplified by providing that the vendor shall within twenty-one days after written request by the purchaser (made at any date subsequent to the final apportionment by the authority of the amount of the liability) pay to the authority the whole of such amount together with any interest thereon payable to the authority.

In the other class of case, above referred to, *i.e.*, where the expense is already due to be met, it may be said (perhaps with greater force) that the vendor effectually discharges his obligations under the condition by paying the expenses in such instalments as the authority will accept. In such cases the primary liability is that of the vendor, whereas in the first case the demand is made upon the purchaser, and any concession as to payment by instal-

ments might be said to be solely for his benefit, with the result that he may, if he so chooses, pay the full amount of the expenses and accordingly claim that amount forthwith from the vendor.

In the second class of case it therefore appears most desirable to substitute for Condition 20 (1) a provision that any such liability is to be discharged in full prior to completion, or that the amount of such liability is to be deducted from the purchase price on completion of the purchase.

Condition 20 (2).

The observations already made upon Condition 14 (5) may be considered in connection with this condition. It is suggested that at the present date the rate of interest payable under paragraph (2) (a) should be £4 per cent.; but as the property will be conveyed subject to the liability referred to in this section, and the purchaser will give a covenant for indemnity, it will not be necessary to qualify the covenants by the vendor implied by his conveying "as Beneficial Owner".

Condition 20 (3).

See observations immediately following the reproduction of Condition 20 above.

It would be out of place to deal here with the Town Planning Acts, or other statutes referred to in this paragraph; but it should be mentioned again that searches certificates should be obtained from the local authority and the county council in all cases where land is being acquired for development or buildings on the land are to be converted to another user or substantially altered. At the present day the purchaser can hardly be said to be in a safe position, where any such works are in contemplation, unless he obtains the approval of his plans:—

(i) By the local authority. Here it should be observed that even if the local authority is also the town planning authority a rather annoying and misleading situation arises from the fact that the formal approval by the local authority as such of the plans of the proposed building or other works does not prevent the council from rejecting the plans in its capacity as town planning authority. In fairness to local authorities it should be said that some councils have followed the practice of placing a clear note on the form of approval pointing out that such approval is so limited.

(ii) By the town planning authority, which may be the local authority or the county council.

(iii) If the property is in London the approval of the county council of the plans will be necessary.

(iv) Under the Restriction of Ribbon Development Act, 1935, the authority being the highway authority—in most cases the county council.

As to the last-mentioned Act the restrictions imposed by the Act are of such importance that it may be useful to summarise its more important provisions:—

(a) It prohibits the erection of buildings (or provision of access thereto), with certain exceptions as to agricultural buildings, within 220 feet of the middle of Class I or Class II roads, according to the Ministry of Transport classification (section 2).

(b) The highway authority may with the approval of the Minister of Transport adopt a standard width for any road. When this has been done no new means of access to or from the road, nor any new building nearer to the middle of the road than half the standard width, will be lawful without the consent of the highway authority (section 1).

(c) The highway authority may fence such roads as mentioned in (a) and (b) to prevent access except at such places as they approve (section 4).

(d) The highway authority may also compulsorily purchase any land within 220 feet of the middle of any road for construction or improvement of a road or for preventing the erection of buildings detrimental to the view from the road (sections 13—15).

(e) With regard to substantial buildings (minimum 250,000 cubic feet), places of public resort (such as theatres and cinemas), refreshment houses, petrol filling stations, or garages for trade or business purposes, the authority can require suitable means of access and egress to be provided so as to prevent interference with traffic. Space for car parking facilities may also have to be provided as a condition of the grant of permission to erect the building proposed in such cases.

(f) Provision is made as to payment of compensation for injurious affection in certain cases. In this connection see the recent case of *Melksham U. D. C.* v. *Wiltshire County Council*, [1937] 4 All E. R. 142.

The Ministry of Transport have recently published a Review of Decisions given by the Minister up to June 30, 1937, on appeals made under section 7 (4) (obtainable at H.M. Stationery Office). This review affords guidance as to the attitude of the Minister

towards various classes of cases. It is only possible here to mention briefly a few points which emerge :—

(1) Ordinarily there is no justification for "ribbon development" along important roads notwithstanding that the developer is prepared to set back the buildings behind the limits of future road widening, and in other respects observe traffic requirements.

(2) Road safety is a primary consideration.

(3) Generally where vehicular access is essential (*e.g.*, in the case of a petrol filling station) two means of access will be required, one as an entrance and another as an exit, to be distinguished by appropriate notices.

(4) The Minister will work in close co-operation with the Town Planning Authority and will in suitable cases hold a joint inquiry.

(5) Conditions attached by the local authority (or county council) to any consent and which involve confiscation of property or rights without payment will not be supported. *E.g.*, "that the developer's land between the present highway boundary and the improvement line shall be dedicated to the public", or that "the council shall be granted an easement" for a certain purpose.

(6) The withholding by a council of consent to development fronting a road which was not itself a classified road subject to restrictions was held to be unreasonable, notwithstanding that the site was within 220 feet of the middle of a classified road.

WASTE AND THE SETTLED LAND ACT.

Re Harker's Will Trusts (1938), 54 T. L. R. 270, raises a problem, which was not discussed in the case. The text-books generally have assumed that the effect of the Property Legislation of 1925 in converting all life estates into equitable interests has not affected the law of waste. This was, apparently, the tacit presumption on which *Re Harker's Will Trusts* (*supra*) proceeded. It is suggested with respect that this may not be the case, though it is thought that in the precise circumstances no difference might, perhaps, have been made in the decision.

In *Re Harker's Will Trusts* (*supra*) the tenant for life in possession cut certain larch plantations which had reached maturity and would in the ordinary course of management be cut. The problem before the Court was whether the proceeds of sale could be taken by the tenant for life or whether she was only entitled to the proceeds after deductions necessary for clearing the ground and replanting the plantations. The will creating the settlement directed that the property should be cultivated and managed according to the custom of the district and gave power to cut timber and underwood for sale. The cutting of the larch plantations was in accordance with the custom of the district. Simonds, J., distinguished *Re Harrison's Trusts* (1884), 28 Ch. D. 220, and *Re Terry* (1918), 87 L. J. Ch. 577, on the ground that they only applied where the cutting was fortuitous owing to accident, as the requirements of war in *Re Terry* (*supra*), and held that the tenant for life was not guilty of waste or mismanagement if she cut the trees without replanting and so that she could take the proceeds of sale. The learned Judge said that there was no question of waste at law or in equity, because larch trees were not timber trees and they were cut according to the proper course of management. It will be observed that the question of liability for waste did not, therefore, really fall to be determined directly, and the case largely turned upon whether the tenant for life had cut in the course of management under the terms of the will and could then take the whole of the proceeds.

In fact this case seems to fall very nearly within the decision in *Re Trevor-Batye's Settlement*, [1912] 2 Ch. 339, which, in the present submission, would be appropriate for its determination.

There the trustees of a marriage settlement bought realty in accordance with the terms of the settlement, which became vested in them on trust for sale. The land included beech woods, also not "timber" trees, which the trustees managed by cutting and replanting. Parker, J., held that the proceeds of sale formed part of the income of the estate, after paying all costs of replanting, repairing and fencing. It should be noticed that the case is distinguishable from *Re Harker's Will Trusts* (*supra*), since there was no provision for management in the settlement. The point, to which special reference should be drawn, is the observation of Parker, J. (at p. 342): "There is no question of waste in the ordinary sense, because it would be the duty of the trustees in case they purchased an estate to manage it in the ordinary and normal course of agricultural or timber cultivation, according to the nature of the estate."

It should be added that in neither case does the report show that the tenant for life was unimpeachable for waste. Clearly, in the second she was impeachable for waste as the interest was created under a settlement of personalty and there would be no clause excluding impeachability for waste, but it is submitted that in the words of Parker, J., no question of waste, impeachability or otherwise, arose because the estate was vested in the trustees for sale and not in the tenant for life.

The purpose of this article is to draw attention to the peculiar difficulty which attaches to the proposition in law that waste continues to apply to tenancies for life. This difficulty arises from two factors. First, the life tenant can have only an equitable interest, to which the Common Law naturally did not attribute any liability, because the estate was not recognised at Common Law. The law of waste, and in particular voluntary waste, was the creation of, and incident to, Common Law estates. On the other hand, where he is in possession, a life tenant to-day will normally be in possession on the strength of a fee simple interest at Common Law. The law of waste has never been held to apply to an interest in fee simple, whether at law or in equity.

Secondly, and perhaps even more importantly, the tenant for life, who is in possession by virtue of his estate ownership under the Settled Land Act, 1925, is expressly declared to be a trustee by section 16 (1) of that Act: "The estate owner shall stand possessed of the settled land and the income thereof upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the equitable interests and powers affecting the settled land or the income thereof." This declaration of trust is new to the Settled Land Act, 1925, and must not be confused with

section 107 of the same Act which, following the precedent of the 1882 Act, provides that the estate owner in the exercise of his statutory powers shall be in a fiduciary position with regard to these powers. In the exercise of those powers he was a trustee, but there was a great deal of difference between that and actually being trustee of the land. In *Re Lacon*, [1911] 2 Ch. 17, in exercise of a Settled Land Act power the tenant for life had recovered damages for breach of a covenant in a lease, but it was held that he was entitled to retain them and not pay them over as capital. In *Re Pyke*, [1912] 1 Ch. 770, the trustees, in whom the fee simple was vested, recovered damages for breach of covenant in a lease, and it was held that it was not a profit which the tenant for life could claim. The case was distinguishable from *Re Lacon* (*supra*), because the breach of covenant occurred before the death of the testator, who created the settlement, and, therefore, the breach constituted a chose in action forming part of his general assets. Warrington, J., however, distinguished *Re Lacon* (*supra*) on a ground more germane to the present proposition. He said (at p. 777): "All that the Court of Appeal there decided was that there was no *equity* to compel the tenant for life to hand over to the trustees the money he had so recovered. The trustees relied on section 53 of the Act of 1882, which provides that a tenant for life shall in exercising any power under the Act be deemed to be in the position of and to have the duties and liabilities of a trustee for the other parties entitled under the settlement. The answer made to that contention was that in recovering damages for breach of a covenant to repair the tenant was not exercising any of the powers of a tenant for life under the Settled Land Acts, but was exercising a right vested in him as the person *legally* entitled to the reversion, and therefore there was no *equity* either under the settlement or under the Act which would require him to hold the money so recovered for someone else" (*a*). This passage, it is respectfully submitted, correctly states the essential difference between being a trustee in respect of the powers and a trustee of the land. It is to be emphasised that the tenant for life becomes a trustee of the land for the first time by virtue of section 16 (1).

At this point it may be suggested that the framers of the Act did not intend to alter the position of the tenant for life by imposing this trust and, consequently, the Act cannot be construed in this manner. The argument is estopped by the history of the statutory trust for sale. There can be little doubt that it was not contemplated

(*a*) This actual point is now dealt with by the Settled Land Act, 1925, s. 80, which makes damages for breach of covenant capital money unless the Court otherwise directs.

that the statutory trust for sale should affect the interests of the beneficiaries. Indeed, there seems little doubt that the framer of the Law of Property Act did not intend the statutory trust to operate as conversion, but it did: *Re Kempthorne*, [1930] 1 Ch. 268. It has operated to modify these rights, however, in a number of other ways: for example, see *Re Price*, [1928] Ch. 579; *Re Flint*, [1927] 1 Ch. 570; *Bernhardt* v. *Galsworthy*, [1929] 1 Ch. 549. It is submitted, therefore, that if the imposition of the express trust on the tenant for life's interest as estate owner in the land has modified his rights in connection with the beneficial interest, it is necessary so to construe the Settled Land Act as to give effect to this modification.

It is, now, necessary to consider in a little more detail the two points made. First, the tenant for life to-day can have only an equitable interest: Law of Property Act, 1925, s. 1. Prior to 1926 where an *equitable* life tenant was *in possession*, and apart from any directions in the will or other instrument conferring a life interest, or in the order of the Court entitling him to possession, the Court applied the law of waste applicable to a tenancy for life at Common Law: cf. the judgment of Chitty, J., in *Dashwood* v. *Magniac*, [1891] 3 Ch. 306. It is to be noticed, however, in *Dashwood* v. *Magniac* (*supra*) that in the Court of Appeal the decision of the Court did not turn upon the law of waste, but the intention of the testator with regard to the user of the property. What, however, is most important to observe is that the equitable tenant for life was not entitled as of right to possession. After the passing of the Settled Land Act, 1882, had conferred powers on the equitable life tenant, it was still held that, though the Act undoubtedly strengthened the claim to possession, it was a matter for the discretion of the Court in such case: *Re Wythes*, [1893] 2 Ch. 369; *Re Bagot*, [1894] 1 Ch. 177. Clearly when the tenant for life was not let into possession it was a question of the law applicable to trustees which governed the question of income and capital and preservation of the trust property, as has been indicated earlier in this article. What is, perhaps, even more significant to our present purpose is the order made by Kekewich, J., in *Re Wythes* (*supra*), adopted in *Re Bagot* (*supra*). The tenant for life was allowed to go into possession only upon the undertaking of his counsel to fulfil certain conditions. It is not necessary, or relevant, to enumerate these conditions, but they included such matters as insuring the property against fire, and keeping the buildings in repair. These duties could by no stretch of imagination be included within the comprehension of liability for waste.

Under section 19 of the Settled Land Act, 1925, it appears

that, subject to exceptional cases, a tenant for life in possession is entitled to have possession of the settled land as estate owner in fee simple. This gives the equitable tenant for life a right to possession, which is new in law. Section 16 (1) of the Act, however, imposes on such a life tenant, when estate owner, the obligation that he is a trustee of the land. This is, perhaps, not such an unreasonable exchange of rights as would appear, considering that the equitable life tenant is only entitled as of right to possession by the operation of section 19.

Furthermore, the acts done in relation to the land are done by the estate owner as such. That is, the acts are done in respect of the fee simple interest, to which the law of waste is not incident either in law or equity. His life tenancy gives him the right to estate ownership, which carries with it the right to possession. This is emphasised by the provision in the Administration of Estates Act, 1925, s. 43 (1), which confers a *power* on personal representatives to permit a person to go into possession prior to making an assent or conveyance. The section does not relate only to settled land, but the existence of a precise statutory power does illustrate the fact that until assent possession is *prima facie* the right of the legal owner.

If, then, the right to possession is vested in the tenant for life in respect of his estate ownership it is pertinent to observe that his acts done as estate owner do not primarily bear relation to his beneficial interest: *Re Liberty's Will Trusts*, [1937] Ch. 176. Here, it is true that the trustees paid money to the estate owner under the statutory powers and it was held that excess payment outside the statutory powers did not operate as a charge on his beneficial interest, but it is submitted that rights enjoyed over the settled land in respect of his estate ownership are not less conferred by his statutory estate than the powers expressly declared to be incident to it. Otherwise to hold would seem to deprive the statutory estate of all powers and rights of enjoyment and this might be even more calamitous than any construction put upon his position by this article.

This severance of rights associated with the legal estate and beneficial interests is also exemplified in two key sections of the Settled Land Act. By section 13 where a tenant for life has become entitled to have a principal vesting deed any disposition *inter vivos* by any person shall not affect the legal estate save in favour of a purchaser of the legal estate without notice. Hence if A creates a trust instrument in favour of B for life with remainders over, A can, in favour of a purchaser without notice, transfer the legal estate. B can do nothing but enter into a

contract to carry out the disposition after a vesting deed has been executed.

By section 18 after the execution of a vesting instrument any disposition, other than a disposition authorised by the Act, is void, except for the purpose of conveying or creating such equitable interests as he has power, *in right of his equitable interests and powers under the trust instrument*, to convey or create. The disposition so far as the settled land is concerned is void, not merely void as regards the legal estate. At least this seems to be the effect of the section. Dispositions, which affect the equitable interests or powers, are apparently valid, but whether a disposition purporting to deal with the property as estate owner will be valid with regard to his equitable interests the section does not say, though this does not appear to be the case since *Re Liberty's Will Trusts* (*supra*). This seems to be the view taken of the saving clause in Wolstenholme & Cherry (12th ed.), Vol. II, p. 985.

The decision in *Re Liberty's Will Trusts* (*supra*) only emphasises the peculiar position of life tenancy at the present day. It is suggested that, though it subsists in realty, a life interest does not subsist in land, but only in a trust fund. The legal estate, save in one case, is not affected by dispositions of the equitable interests under a trust instrument. For example, if under the trust instrument A has a life interest in possession, B has a life interest in remainder, with remainders over, and the legal estate is vested in A, and B assigns his life interest to C, on A's death the legal estate will then be vested in B under section 104 (1) of the Settled Land Act, 1925. C can only call for the legal estate on A's death, where C was the person next entitled in remainder on B's death: *ibid.*, section 105; cf. *Re Shawdon's S. E.*, [1930] 2 Ch. 1. What is more it would appear that a life tenant may be excluded from his right to estate ownership by a prior right, such as that of trustees of a portion term, who have entered into possession under the term: *Re Stamford and Warrington's Contract*, [1927] 2 Ch. 217; cf. *Re Stamford and Warrington*, [1925] Ch. 162: *sed quære*. If this last view of the position of a life tenant is correct, the view that an estate owner should not be regarded as liable in waste becomes even stronger, if that position requires strengthening. It is submitted that it does not.

The argument thus submitted has two aspects. First, the life tenant as equitable owner is not as such subject to the law of waste unless and until he is allowed to take possession. Secondly, to-day an estate owner is not in possession of the settled land by reason of his life tenancy but as estate owner in fee simple, which is properly regarded as a separate estate altogether.

Accepting this position it is then necessary to determine the liability of the estate owner in his dealings with the land in relation to other persons interested under the settlement. It is here that the provisions of section 16 (1) become significant. With regard to the settled land he is now an express trustee. His liabilities are those which equity will attach to his trusteeship. It is submitted that these liabilities should not properly be those formerly attaching to an equitable tenant for life in possession, but those of a trustee properly so called. In one direction the Settled Land Act has made express provision, namely, the elaborate provisions for improvements. Though these primarily have relation to the expenditure of capital money (hence their incorporation in the Act), the provisions include maintenance and repair, and capital moneys may be raised for the purpose by a charge on the settled land. Repayment of the money so charged may be by way of instalments for which a rentcharge can be created, but unlike other charges will be overridden by a disposition under the Act : section 85.

It is not the purpose of this article to examine at length the problem of the liabilities attaching by reason of this trusteeship. Indeed, in the absence of judicial decision upon the point it is not possible to speak save in uncertain terms. It could, of course, be argued that in this respect equity will follow the law and attach to this trusteeship the equivalent rules that formerly existed in connection with legal estates for life. It is suggested that the changed conditions which prevent the interposition of trustees of the legal estate, who may safeguard it against the careless tenant for life, and the restrictions which could be imposed by the Court upon letting an equitable life tenant into possession, are sufficient to prevent this wholesale abandonment of the general principle of trusteeship. It might be that the Court would adopt similar rules to those of the equitable tenant for life let into possession, where the law of waste would apply, subject, it is submitted, to any guiding principles concerning the management of the estate to be found in the trust instrument, whether deed or will, under the principles enunciated by the Court of Appeal in *Dashwood* v. *Magniac* (*supra*). It is, however, submitted that it would be more consonant with the Settled Land Act, 1925, and the trend of this legislation to adopt the attitude of the Courts towards the exercise of the powers under the statute. As has been indicated, so far as the settled land is concerned the life tenant has a statutory legal estate which he is directed to hold upon trust. The nature of this trust is obviously peculiar, as was the position of the statutory powers under the old law: see, *e.g.*, *Re Hope*, [1899] 2 Ch. 679; *Re Lacon*, [1911] 2 Ch., at p. 25; *Re Stamford and Warrington*,

[1916] 1 Ch. 404, at p. 420. That the Court would insist upon the full accountability to the remainderman demanded of the trustee is, perhaps, less probable but, it is suggested, not beyond the bounds of possibility. In this respect there may be room for assimilation between the trust for sale and settled land.

It should be added, here, that the application of this principle of trusteeship would have one aspect to recommend it. It would eliminate the peculiar, and fundamentally undesirable, difference between life tenancy and other limited interests. There can be little moral or legal justification for protecting the remainderman on a life interest in a manner not afforded, for example, to one entitled to an executory limitation over on breach of condition. It is suggested that all interests subsisting under a trust instrument are entitled to similar protection. The result would be that one anomaly thrown up by the long history of the land law, which at one time admitted few limited interests, would become an anomaly of the past. The tenant in tail after possibility of issue extinct would cease to be a hybrid.

It is thought, however, that this must remain in the realm of conjecture. The purpose of this article is achieved if it has been made clear that to-day the old rules governing legal tenancy for life have ceased to be operative. A modern tenant for life does not enjoy possession of the estate as such, but in virtue of a statutory fee simple upon which is imposed a statutory trust.

HAROLD POTTER.

CONVEYANCING WITH REGISTERED LAND.

(*Continued.*)

By F. R. Crane, LL.B., Solicitor.

Before proceeding to the next head two points may be noted, which have come to the writer's notice since the previous article on First Registration (*ante*, pp. 106—127) was written. First, an application for first registration of an original lessee with absolute title, where the lessor's title was registered, has been successfully made without objection from the Registrar. Secondly, the Registrar will, prior to an application for first registration, usually indicate whether a particular plan of the land will be satisfactory. This may be useful where there is in existence a plan which does not exactly correspond to one of the regular Ordnance scales, but is based on the Ordnance Map.

III.—Transfer on Sale.

Under this head will be discussed the points which will commonly require consideration by the advisers of the vendor and purchaser on a sale of registered freehold or leasehold land. Some points will be dealt with elsewhere, and in particular the organisation by the vendor of a building estate prior to dealings will appear under Building Estates. It is hoped, however, to say sufficient here to enable practitioners to carry through an ordinary sale and purchase and this must necessarily include some references to building estates.

It is proposed to divide the subject into four heads—The Contract, Investigation of Title, The Transfer, and Completion of the Purchase (which will, of course, include the registration of the transfer). An objection to this arrangement is that unless the legal effect of a transfer and of any technical phrases therein is known, it is not possible to decide what provisions should be inserted in a contract to guard against any pitfalls there may be. The truth of this is admitted and therefore under the first head—The Contract—will be included a number of matters, such as the covenants for title implied by a transfer as beneficial owner, which might be expected under the third head. The arrangement here adopted may be defended and, it is submitted, justified, on the grounds,

first, that it is convenient in articles such as these to deal with matters in the order in which the practitioner will meet them and, secondly, because as the transfer can only carry out the terms of the contract, it is essential that the latter be carefully drawn. For example, on investigation of title it may be discovered that the vendor has no title to part of the land which the purchaser expected to buy, but the latter may be bound because the description in the contract is by reference to the register rather than to the physical features of the land. Sometimes country practitioners send contracts and abstracts relating to registered land to London agents, but it is not always possible to give them an opportunity to settle the contract. It is therefore submitted that many of the technicalities of registered conveyancing require consideration on the contract and so may properly be discussed under that head.

(1) *The Contract.*

It is thought that, apart from questions arising from the form of the statutory abstract of title provided for by the Act (see below and section 110), almost all the points requiring particular attention in connection with the contract to sell registered land are really different aspects of one problem, which must now be discussed. In unregistered conveyancing the property to be sold has to be described, first, by reference to the physical features of the property, including in this term not only measurements and boundaries but also disclosure of, for example, rights of way; secondly, the legal quantum of interest enjoyed by the vendor must be stated, as must the existence of rights vested in third parties, *e.g.*, restrictive covenants. What is sold must therefore be particularised and there rests upon the vendor's advisers in the first place the responsibility of deciding, by reference to the deeds and by inquiry of their client, what the vendor can safely contract to sell. If the purchaser's investigation of the title shows that a wrong decision was made, the purchaser will probably have a remedy of rescission or compensation, subject to the effect of any condition. No purchaser of unregistered land would sign a contract by which he agreed to buy "the property to which the vendor has title by virtue of the deeds set out in the schedule hereto subject to encumbrances disclosed thereby and to any others that may in fact exist".

In registered conveyancing, on the other hand, the register and filed plan, combined with the law contained in the Act and Rules, define both the physical extent and the legal quantum of the interest. The physical area to be sold will usually be described as

"land at Middleton in the County of Blankshire being the land comprised in Title No. XYZ and shown on the copy of the filed plan annexed hereto". Since this description follows that in the register (see specimen register, *ante*, p. 45) it is difficult to see how the purchaser can object, although by this wording the vendor's solicitor has evaded the responsibility of deciding to what his client has title (see below for a fuller discussion). It has been suggested (Potter, *Conveyancing under L. R. Act*, pp. 323, 324) that, since a transfer of registered land necessarily takes effect subject to interests protected on the register and to overriding interests (sections 20 and 23), a contract drawn in the above form, without any reference to entries in the charges register or overriding interests, may be a contract to sell only what the vendor has and will relieve him of any duty of disclosure. It is thought that in practice, while the land is described as above, it is more usual to disclose entries in the charges register and to add "subject to overriding interests, if any". The learned author above-mentioned regards this as being an example of a condition requiring the purchaser to accept the vendor's title and would apply the ordinary rules of unregistered conveyancing, under which the vendor must disclose anything of which he knows (see, *e.g.*, *Nottingham Patent Brick and Tile Co.* v. *Butler* (1885), 15 Q. B. D. 261).

It is submitted, with respect, that the latter view is correct and also that even if the contract was simply to sell "the land comprised in Title No. XYZ" the Court would hold that interests protected on the register and overriding interests known to the vendor ought to be disclosed, unless such interests were of a class that did not need disclosure in unregistered conveyancing—*e.g.*, land tax (see below). Sections 20 and 23, it is submitted, are merely declaratory of the effect of a transfer, just as a statute codifying the law of unregistered conveyancing would have to declare that a conveyance took effect subject to outstanding legal and equitable interests; if this view be correct the sections would not affect the duty of disclosure as between vendor and purchaser. It seems that the only case in point where the description was in the more usual form is *Re Brine and Davies' Contract*, [1935] Ch. 388, in which it was held that a vendor must disclose that he has only a possessory title and that the existence of a condition requiring the purchaser to accept the title will not affect the remedy of rescission. This would seem to indicate that the ordinary law will be applied, at any rate where the clauses usual in unregistered conveyancing are employed.

Whatever be the true interpretation of the Act, it is clear that special precautions are necessary and these must be considered in

more detail shortly. Before so doing it should be observed that section 110 of the Act contains detailed provisions as to title and these, when combined with the matters just discussed, affect incidental matters such as the covenants for title and indemnity that should be given and taken. The various points arising on a contract must now, therefore, be considered individually.

(i) *As to Land Tax, Tithe Annuity, and Local Land Charges.*— These three matters, all of which are overriding interests (section 70 (1) (e) and (i), L. R. Act, 1925, and section 13 (11), Tithe Act, 1936) are grouped together because in unregistered conveyancing, at any rate, prior to the Tithe Act, 1936, the vendor did not need to disclose their existence and the purchaser could not complain of such non-disclosure. Therefore inquiry and, where possible, search should be made before contract. That this is the position in regard to land tax seems clear and also that it was true of tithe rentcharge (Williams, *Vendor and Purchaser* (4th ed.), pp. 214, 215). Section 13 (8) of the Tithe Act, 1936, makes tithe annuity an incumbrance for the purposes of section 183 of the Law of Property Act, 1925, which imposes penalties on persons concealing material incumbrances with intent to defraud, and the general view would seem to be that this by implication makes it necessary to disclose tithe annuity (see *Law Society's Gazette*, Vol. XXXIII, No. 10, p. 217). In practice this seems to mean that the wise vendor will disclose, and the purchaser search for, tithe annuity; the search is made at the offices of the Tithe Redemption Commission, lately the Ministry of Agriculture and Fisheries, Old Bailey, E.C., the fee being 2s. 6d. If tithe annuity is likely the vendor's solicitor may be well advised to search, since the land might be part of a larger area the whole tithe on which has been borne by another landowner. Moreover, any person registered in the Annuities Register as the owner of land subject to tithe annuity has to give the authorities notice of any change of ownership (sections 9 (1) and 18 (3), Tithe Act, 1936).

It should be observed that the Registrar may note on the register that the land is free from land tax or tithe annuity (section 70 (1), proviso).

Local land charges are the only type of land charge registrable under the Land Charges Act, 1925, which do not require protection on the register (section 59); even they must be protected on the register before realisation (section 52 (2), proviso, and L. R. Rule 155), but until then are overriding interests (section 70 (1) (i)). Section 198 of the Law of Property Act, 1925, as interpreted in *Re Forsey and Hollebone's Contract*, [1927] 2 Ch. 379, and *White* v. *Bijou Mansions, Ltd.*, [1937] Ch. 610, and 54 T. L. R. 458, therefore

presumably applies to give the purchaser notice before contract of such charges and so relieve the vendor of any duty of disclosure. Search should therefore be made prior to contract in the registers of both the district or borough and county councils, and the writer has found in practice that it is useful to ask some supplementary questions, even if this results in doubling the 5s. fee. For example, a certificate of search will show if there are outstanding road charges, but not if the road has not yet been taken over, so that no charge is yet in existence; similarly a certificate will not necessarily show if a notice as to smoke abatement, for instance, has been served.

To treat of the above three interests separately from other overriding interests involves the division of these into classes corresponding to similar interests in unregistered conveyancing, and it might be held that this is not possible. Nevertheless it is submitted that the list of overriding interests is only a heterogeneous collection of interests which it was not considered convenient to protect on the register, and consequently that to divide them into classes is justifiable. In any case it seems clear that inquiry and search before contract is the safest course.

(ii) *As to Position, Area and Boundaries.*—It was pointed out in the previous article on the Register (*ante*, pp. 46-7) that the Ordnance Map, as represented by the filed plan or General Map, forms the basis of all descriptions of registered land (section 76 and L. R. Rules 272, 273). Verbal particulars may be entered on the register, but must refer to the plan and be compared therewith by the Registrar (Rule 281), who in the event of conflict decides whether the plan or description shall prevail (Rule 285). It is submitted that even if there are verbal particulars these provisions displace the presumption of unregistered conveyancing, that a clear verbal description overrides a plan (*Horne* v. *Struben*, [1902] A. C. 454), so that any plan must be carefully checked. Normally, however, no verbal particulars will appear, but as was pointed out above, the description given on the register and in the Land Certificate will be followed. Furthermore, the copy of the filed plan will not, as a rule, contain any measurements, although it will be drawn to scale. On a sale of the whole of the land comprised in a title therefore it seems doubtful whether the purchaser can insist on the vendor giving particulars of the measurements of boundaries or of the distance of the property from any landmark, such as a corner, but if only part of the land is sold, it is suggested that the purchaser is entitled to and should insist on measurements being supplied, unless such part is defined by natural boundaries shown on the Ordnance Map.

Where no measurements are supplied, the length of boundaries

and the position of the property can be ascertained by scaling up the plan, although to be exact this will involve the careful use of a ruler graded down to, say, a millimetre. It seems, however, that such scaling is necessary, for a difference of a few feet has been held sufficient to entitle a purchaser of a small plot to rescission (see *Bellotti* v. *Chequers Developments, Ltd.*, [1936] 1 All E. R. 89), or may affect the price if this is based on area or frontage. Having found what the measurements should be, the purchaser's solicitor can ask the vendor to warrant that they are correct, but it is thought that such a request could quite properly be refused. The alternative seems to be to send the plan, after putting in the measurements, to the purchaser and asking him to check them, for the vendor could not refuse to permit access for this purpose. Whether such checking is done or not, it seems very desirable to obtain in every case the purchaser's approval of the plan and of the approximate measurements, in order to prevent the possibility of a discrepancy between the area the vendor has and the area the purchaser has seen on the ground.

If a discrepancy is discovered, either the register or the fences will require to be rectified, having regard to the fact that until rectification there is a registered title only to what is shown on the filed plan. In either case much trouble may be involved in discovering the original cause of the error and thereafter in remedying it; rectification of the register, for example, will normally involve an application to the Court or the consent of all persons affected thereby (section 82). If there is a larger area on the ground than on the plan, a purchaser may be willing to be registered with possessory title only to the extra piece (see sections 6 and 11 and Rules 36—38 and 42), especially as this can eventually be converted into an absolute or good leasehold title (section 77). Differences between the plan and the ground may occur from a variety of reasons; while none are, fortunately, frequent, two possible ways are that two landowners may agree to an alteration of fences without thinking it necessary to have any legal document, or that on a building estate a builder may in erecting fences deviate slightly from the estate plan—the cumulative effect of this might be very serious, and more will be said about it under BUILDING ESTATES. Simple encroachment is, of course, a third possibility.

If the land is leasehold, a copy of the lease will form part of the abstract of title (section 110 (1)) and in addition to the above precautions it should be seen that the plan on the lease is identical with the filed plan.

If the views above stated be correct, the usual condition, that misdescription shall not annul the sale and shall either entitle or

not entitle the purchaser to compensation, appears to be irrelevant, for the vendor will have contracted to sell only what is on the register. As a rule, however, the plan on the draft contract will actually be copied from the plan on the Land Certificate, which is a copy of the filed plan (Rule 261 and Form 78). If it should happen that the Land Certificate plan had been unauthorisedly altered, then, it is suggested, there would be a case of misdescription which would be covered by the condition to the usual extent—if the defect was substantial, rescission could be claimed but a demand for compensation would be governed by the condition (*Bellotti* v. *Chequers Developments, Ltd.*, [1936] 1 All E. R. 89, *supra*; *Jacobs* v. *Revell*, [1900] 2 Ch. 858).

As regards boundaries, the question of measurement has already been discussed, and therefore attention need only be drawn once more to Rule 278 (*ante*, pp. 47, 118) which, by providing that boundaries are general only, makes necessary inquiry as to the ownership of and responsibility for hedges, fences, private roads, etc.

It may be mentioned here that the description, in which term are to be included any specific overriding interests and other matters (see below) that affect the land, finally agreed upon in the contract should be carefully followed in the transfer, for the general rule of unregistered conveyancing, that the contract is merged in the conveyance in the absence of a contrary intention, presumably applies to transfers under the Act; it has recently been held by the Privy Council so to apply to the corresponding Act in Canada (*Knight Sugar Co., Ltd.* v. *Alberta Ry. and Irrigation Co.*, [1938] 1 All E. R. 266 : see *post*, p. 262).

It will have been observed that this problem of position, area and boundaries has been discussed primarily in relation to a sale by private treaty. On a sale by auction it is not, it is submitted, possible to limit the description in the particulars by a condition providing that the vendor did not agree to sell anything not comprised in the Land Registry filed plan. It is thought that such a condition, following upon an auctioneer's full description by reference to the physical features of the property, would make the particulars and conditions as a whole misleading. In consequence it would appear desirable for the solicitor and auctioneer between them to compare the land with the filed plan on the lines above suggested.

(iii) *As to Overriding Interests.*—Land tax, tithe annuity and Local Land Charges have already been considered, and the question of outstanding rights where the title is possessory or qualified (section 70 (1) (h)) will be dealt with below. The remaining

overriding interests under section 70 (1), apart from some exceptional ones (see sub-sections (c) (d) and (l)) are leases of twenty-one years or less (sub-section (k)), easements, profits and kindred rights (sub-sections (a) and (j)), rights arising from occupation (sub-sections (f) and (g)) and customary or manorial rights (sub-sections (b) and (j)). Subject to the possibilities discussed above, first, that a contract to buy simply "the land comprised in Title No. XYZ" is an agreement to make a "blind" purchase, and second, that it may perhaps not be possible to divide overriding interests into different categories, it is submitted that the rules of unregistered conveyancing apply to these remaining overriding interests, and it is therefore proposed to summarise those rules.

Defects patent on inspection need not, it seems, be disclosed (as to what is patent, see *Ashburner* v. *Sewell*, [1891] 3 Ch. 405). Apart from this a vendor must disclose all latent defects of which he knows or has notice (*Nottingham Patent Brick and Tile Co.* v. *Butler* (1885), 15 Q. B. D. 261), and in this class are included tenancies, etc. (*Caballero* v. *Henty*, L. R. 9 Ch. App. 447), although, as against the occupier, a purchaser has notice of the rights of persons in possession (*Hunt* v. *Luck*, [1902] 1 Ch. 428). Failure to disclose gives the purchaser a right to rescission or compensation according to the seriousness of the defect (*Flight* v. *Booth*, 1 Bing. (N. C.) 370; *Re Belcham and Gawley's Contract*, [1930] 1 Ch. 56); a condition in the contract cannot affect the right to rescission but only that to compensation. A latent defect unknown to the vendor will only entitle the purchaser to rescind where the purpose for which the land is sold is known to the vendor and the defect prevents such purpose being carried out (*Re Puckett and Smith's Contract*, [1902] 2 Ch. 258 : an unknown watercourse under building land). The above remedies are only available prior to conveyance; thereafter the covenants for title must be relied upon, even if these are not of such general assistance (*Stoney* v. *Eastbourne R. D. C.*, [1927] 1 Ch. 367). The application of covenants for title to registered land is discussed below, as is the title which must be deduced in respect of overriding interests.

In practice, therefore, it is suggested that the vendor should disclose all overriding interests of which he knows and that a purchaser should try to ascertain, prior to contract, if any exist, both by a careful inspection of the land and by specific inquiry of the vendor, unless the contract is drawn so as to show that the latter is disclosing everything of which he knows.

(iv) *Interests Protected by Entries in the Charges Register.*—It is submitted that the rules suggested above in relation to overriding interests, as to the duty to disclose and the effect of failure

to do so, are equally applicable to the interests now under discussion. Furthermore, there is not the same difficulty in stating what does exist, for it is simple and usual to incorporate a copy of the charges register in the draft contract, and this seems to be the proper course.

Since all land charges except local land charges require protection on the register instead of under the Land Charges Act, 1925, s. 59 (2), section 198 of the Law of Property Act, 1925, which gives notice, prior to contract (*Re Forsey and Hollebone's Contract*, [1927] 2 Ch. 379), of interests registered under the Land Charges Act to all persons for all purposes, and so apparently makes disclosure of such interests unnecessary, only affects purchasers of registered land as regards local land charges, which have already been dealt with. There is no exactly corresponding provision in the Land Registration Act, but sections 20, 23 and 52 enact that dispositions by a registered proprietor take effect subject to all matters protected on the register, though such protection does not confer validity on any interest which would not otherwise bind a purchaser, *e.g.*, a restrictive covenant unenforceable because the benefit was not annexed to any land (see *Re Union of London and Smith's Bank*, [1933] Ch. 611). Section 50, however, provides that if notice of a restrictive covenant or agreement is entered "the proprietor of the land and the persons deriving title under him . . . shall be deemed to be affected with notice of the covenant or agreement as being an encumbrance on the land". *White* v. *Bijou Mansions, Ltd.*, [1937] Ch. 610; [1938] 54 T. L. R. 458 has extended the operation of these sections by deciding that a lessee is bound by restrictive covenants protected on the freehold register, although under section 44 of the Law of Property Act, 1925, he was, apart from stipulation, debarred from investigating such title. In this case Simonds, J., actually held the covenants unenforceable by reason of non-annexation of the benefit and his judgment has been upheld by the Court of Appeal on this latter ground without any reference to or disapproval of the decision as to the burden of the covenant.

The question therefore arises as to whether a purchaser of registered land has before contract notice of interests protected on the register so as to destroy the duty to disclose. The answer is far from clear but it is submitted that a purchaser has no such notice, for, even if the word "disposition" in sections 20, 23 and 52 includes a contract, it is nevertheless suggested that those sections do not operate to give notice before the disposition is made, for they are concerned with the effect of the disposition rather than with the doctrine of notice. Section 50, referring to notice of

restrictive covenants, is more difficult but it is to be noted that this section refers to notice to " the proprietor of the land and persons deriving title under him ", whereas section 198 of the Law of Property Act, 1925, refers to notice to " all persons for all purposes connected with the land ". It is therefore submitted that investigation of the register before contract is unnecessary, and that failure to disclose any interest protected thereon will, if amounting to a substantial misdescription as defined by the cases, entitle the purchaser to rescission. If this view is correct, there is a distinction between the position of interests protected under the Land Charges Act and the Land Registration Act, but it is submitted that the abrogation, for registered land, of the doctrine of *Re Forsey and Hollebone's Contract*, would be welcome in practice.

White v. *Bijou Mansions, Ltd.*, above referred to, raises two subsidiary problems. First, can a purchaser of leasehold land who discovers he is bound by defects, of which the vendor had no actual knowledge, claim rescission on the ground that the vendor had notice thereof and so should have disclosed them, or will they be regarded as latent defects, in which case the rule in *Re Puckett and Smith's Contract* (*supra*) would apply? It is submitted, with hesitation, that as section 50 gives the vendor, being the proprietor, notice of restrictive covenants, he must disclose them. It is also submitted that other protected interests might well be classed as latent defects, since section 50 does not apply to them, but only sections 20, 23 and 52.

The second subsidiary question is whether a solicitor permitting his client to accept a good leasehold title could be held guilty of negligence if defects of the *White* v. *Bijou Mansions, Ltd.*, type were discovered. It is submitted, again with hesitation, that in the absence of special circumstances, an action of negligence should not succeed; if, however, the purchaser was proposing to change the user of the premises the position might be different, and it is suggested that in such a case specific instructions should be obtained. Even on an assignment it would be possible, though unusual, to arrange to investigate the lessor's title. It may be noted that this problem will not be so acute if, as suggested previously (*ante*, pp. 49, 121), absolute title was obtained, for if the Registrar did not note the adverse interests, there would presumably be a right to compensation.

(v) *The Title to be Deduced.*—The contract should state whether the vendor has an absolute, good leasehold, qualified or possessory title; in the absence of any statement he will be presumed to have an absolute title to freeholds (*Re Brine and Davies' Contract*, [1935] Ch. 388). In regard to leaseholds it is suggested

that a good leasehold title will be presumed, but there is no authority for this; it does seem desirable if the lease is an underlease, to state this (*Re Russ and Brown's Contract*, [1934] Ch. 34). These rules are subject to "the land comprised in Title XYZ" case discussed above and it should be mentioned that the contract in *Re Brine and Davies' Contract* was not drawn on that basis. It is submitted that the clauses, usual in a contract for sale of registered leaseholds, that the vendor is registered with a good leasehold title and that the abstract shall consist of a copy of the entries on the register with an authority to inspect the same (see section 110 and below), are equivalent to an express condition that the purchaser shall accept the title so shown. If this view is correct no other special clause to deal with interests unknown to the vendor but binding the land under *White* v. *Bijou Mansions, Ltd.*, will be necessary.

Section 110 of the Act sets out the title to be deduced and must now be summarised and commented upon. It is dealt with here rather than under Investigation of Title because both parties will want to know their rights and duties prior to contract in order to decide if any special provisions are necessary.

Notwithstanding any contrary stipulation the vendor must furnish the purchaser with an authority to inspect the register and, if required, with a copy of the subsisting entries on the register and of any filed plans, and copies or abstracts of any documents or any part thereof noted on the register so far as they respectively affect the land to be dealt with (except charges or incumbrances registered or protected on the register which are to be discharged or overridden at or prior to completion) (section 110 (1)), but nothing gives him a right to copies or an abstract of any settlement lodged at the Registry (section 110 (1), proviso (b)). Any filed copies or abstracts referred to on the register must be deemed to be correct and no further evidence, such as production of the original, may be required, nor has a purchaser notice of the contents of any part of a document if such part is not so filed (section 110 (4)). Frequently a clause is inserted in the contract more or less reproducing this section, but sometimes without the reference to copies, etc., of documents noted on the register; such an omission is of course immaterial. Entries in the charges register or notes of overriding interests on the property register are usually in a concise form, *e.g.*, "The land [coloured brown] is subject to restrictive covenants [rights of way]". The covenants are as a rule set out in full in a schedule. In neither case, however, is it usual for the entry to disclose the terms of the imposition of the covenant (see *Re Union of London and Smith's Bank*, [1933] Ch. 611; *Re*

Ecclesiastical Commissioners, [1936] Ch. 430) or the extent of the grant of the overriding interest. Copies of the filed transfers will therefore be necessary to ascertain the extent of the purchaser's future liability, but it is submitted that, until asked for copies, the vendor fulfils his duty by disclosing the existence of the rights. Whether the purchaser should see the filed documents before contract or on investigation of title will depend upon the circumstances of the case. It would seem that on a sale by auction it might be prudent for the vendor to disclose, in addition to the existence of such interests, the terms of their imposition.

Where the land is leasehold the lease will be noted on the property register (Rule 5) so that the purchaser will be entitled to a copy, and, as in unregistered conveyancing, such a copy should be supplied with the draft contract or made available for inspection prior to the auction.

It will be noticed that the Act apparently contemplates that no abstract should be given of the ordinary mortgage or charge which will be paid off on completion out of the purchase-moneys (section 110 (1)). On the other hand, a purchaser who is to receive for lodgment at the Registry, in exchange for his purchase-money, a Land or Charge Certificate, an executed transfer and a discharge of the charge, will want to satisfy himself of the validity of the discharge. The form for this is No. 53 and reads as follows: "I, A B, of, etc. (registered proprietor) hereby admit that the charge dated, etc., and registered, etc., of which I am proprietor has been discharged" (and see section 35 and Rules 151, 152), but if, for example, the charge was to secure further advances the discharge must refer to the total amount due (Note to Form 53). Unless, therefore, the entry in the charges register makes clear that there were no unusual provisions in the charge, it is submitted that the contract should provide for it to be abstracted, and that the words "notwithstanding any contrary stipulation" in section 110 (1) are not to be construed so as to prevent this.

The cost of the abstract outlined above falls on the vendor unless the purchase-money does not exceed £1,000, when in the absence of stipulation the purchaser has to pay for copies of entries, noted documents, etc. (section 110 (1), proviso (a)). Presumably the idea was that, on small sales, merely inspection of the register would be necessary, but in practice difficulties arise as frequently on small sales as on large and it is strongly contended that the vendor should in all cases pay for the ordinary abstract. It is believed, however, that the practice varies.

In addition to the above the vendor must, subject to any contrary stipulation, at his own expense furnish the purchaser with

such an abstract as would have been sufficient in unregistered conveyancing to any appurtenant rights and interests as to which the register is not conclusive and to any matters excepted from the effect of registration (section 110 (2)).

This refers, firstly, to the case where the vendor has only a good leasehold possessory or qualified title (see sections 6, 7, 10, 11, 12, and *supra*, pp. 47—49) and in effect requires the vendor to show a good title up to the date of registration. A good leasehold title excepts from the effect of registration all matters arising under the superior title or titles (section 10), so here presumably section 110 (2) entitles a purchaser to investigate apart from stipulation, only the superior titles permitted by section 44 of the Law of Property Act, 1925, as interpreted in *Gosling* v. *Woolf*, [1893] 1 Q. B. 39. This is quite apart from the *White* v. *Bijou Mansions, Ltd.*, problem already discussed, for that case dealt with covenants arising on a title that the lessee was not entitled to inspect.

A possessory or qualified title will only exist in practice where there is some defect, so a condition in the contract will be required. Where a title is possessory, however, the Registrar may on a transfer for valuable consideration register the transferee with absolute title (section 77 (2)); after fifteen years if the land be freehold and ten if leasehold, he shall, if satisfied of the proprietor's possession and after notice to neighbours and sometimes advertisement, enter the title of the proprietor as absolute or good leasehold (section 77 (3) (b) and Rule 48 (2)). Application for conversion can, of course, be made at any time (see Rule 49), if a change of circumstances warrant it. If, therefore, a possessory title has been held for fifteen or ten years, it seems reasonable to provide in the contract that no title beyond that afforded by the register should be deduced, coupled perhaps with a statutory declaration of enjoyment by the vendor if the Registrar should require this. If the possessory title has not been enjoyed for the necessary length of time the vendor will probably insert a condition restricting the title to the evidence which is available. It may also be noted that after ten years a good leasehold title can in similar circumstances be converted into an absolute one, which would solve the *White* v. *Bijou Mansions, Ltd.*, difficulties.

The second application of section 110 (2) is to overriding interests, whether appurtenant (see section 71) or adverse. Appurtenant overriding interests proved to the Registrar's satisfaction and capable of existing as a legal estate may be entered on the register either on first registration or on subsequent application (sections 70 (3), 19 (2) and 22 (2); Rules 251—258). Adverse interests created by an instrument and subsisting at the time of

first registration must be noted (section 70 (2)) and others may be (section 70 (3)). Sections 19 (2) and 22 (2), enacting that dispositions (including a grant of an easement right or privilege—section 18 (1) (c) and (e), and section 21 (1) (d)) must be completed by registration, provide that nothing "shall render necessary the registration of any easement right or privilege except as appurtenant to registered land or the entry of notice thereof except as against the registered title of the servient land". This would seem to imply that such easements, etc., require noting on both the dominant and servient titles to be effective, which interpretation is suggested as a possibility, not intended under the Act, in Potter's *Conveyancing under the L. R. Act* (p. 273). "Overriding interests" are, however, defined as interests not entered on the register but subject to which dispositions take effect (section 3 (xvi)); further, the provisions (sections 19 (3) and 22 (3), Rule 251) applying section 62 of the Law of Property Act, 1925, to transfers of registered land would be meaningless if the implied rights under that section had to be noted to be effectual, while it is elsewhere shown (Rule 252) that invariable notation was not anticipated. The practice of the Registry is to note only the more simple rights (such as leases or rights of way, as opposed to, *e.g.*, drainage rights) whether appurtenant or adverse and any decision upsetting this scheme would invalidate many rights. Nevertheless, it would seem convenient to obtain entry of overriding interests where possible; such an entry on the dominant title, unless qualified, confers such an absolute, good leasehold, etc., title to the interest as the proprietor has to the land (Rule 254), so that a copy of the entry and probably as mentioned above of the filed transfer creating the interest will be sufficient evidence of title. In other cases, or where the interest is adverse, a condition should be inserted if a full unregistered title is not to be deduced. It may be noted that an adverse interest, as well as an appurtenant, will probably be noted by reference to a filed document.

Finally, section 110 provides (sub-section (3)) that, despite any contrary intention, the vendor need not furnish any evidence of title other than that discussed above.

(vi) *Covenants for Title and Indemnity on Sale of Freeholds.*—A transfer by the vendor as beneficial owner, trustee, etc., will imply the usual covenants for title (section 76, L. P. Act, 1925, especially sub-sections 1 (A) and 1 (F)), which would in similar circumstances be implied in unregistered conveyancing (Rule 76) and will be enforceable by successors in title in the same way (section 77 (2)); the contract should therefore state, as it usually does in practice, the capacity in which the vendor will convey.

The covenants for title, however, take effect as if the transfer was expressly made subject to (a) all charges and other interests protected on the register at the time of execution, and (b) any overriding interests of which the purchaser has notice and subject to which it would have taken effect had the land been unregistered (section 38; Rule 77 (1)). The second exception may cause difficulty. The interpretation to be placed upon the word "notice" has not been the subject of judicial decision, but it may be noted that, especially where rights arising from occupation or user are concerned, a purchaser has as against third parties notice of many matters, *e.g.*, tenancies and easements, which the vendor is bound to disclose (see above; *Ashburner* v. *Sewell*, [1891] 3 Ch. 405). It has therefore been suggested that the covenants for title should be expressly extended to cover all overriding interests (Potter, *Conveyancing under L. R. Act*, pp. 68—9, and Appendix, Part II, Form 1, p. 355). It is respectfully submitted that this would be a proper and desirable provision to insert in the contract, for it only seems to assimilate the position to that in unregistered conveyancing, and even there a covenant for title may prove to be a broken reed as compared with the remedy of rescission available before conveyance (see *Stoney* v. *Eastbourne R. D. C.*, [1927] 1 Ch. 367). It would seem that an extended covenant for title might provide a remedy for a purchaser damnified as a result of the decisions in the *Chowood Cases* (discussed in the previous article on First Registration, *ante*, pp. 125-6).

The question of a covenant for indemnity in relation to freehold land arises where a sale is made subject to restrictive covenants previously imposed, with which the Act does not deal. It was held in *Re Poole and Clark's Contract*, [1904] 2 Ch. 173, that a purchaser must give a covenant for indemnity even if the contract merely stated that the sale was subject to restrictive covenants, but it would seem better to provide for this in the contract.

(vii) *Covenants for Title and Indemnity on Sale of Leaseholds.*—A transfer by a vendor as beneficial owner, trustee, etc., will imply the same covenants, enforceable to the same extent, as in unregistered conveyancing (section 38; Rules 76, 77). These are the usual four which apply to freeholds and a covenant to the effect that all the requirements of the lease have been properly performed (section 76 (1) (A) and (B), Second Schedule, Parts I and II, Law of Property Act, 1925). The latter covenant is also provided for by section 24 (of the L. R. Act) which enacts that it shall be implied in *any* transfer—whether or not for valuable consideration, and whether or not the words "beneficial owner" are used. If, therefore, the vendor proposes to convey only as trustee, etc., it will be desirable

to state in the contract that the covenant implied by the Law of Property Act, 1925, in a conveyance as trustee, etc. (section 76 (1) (F), L. P. Act, 1925) shall be substituted for section 24. Rule 115 permits this. In addition the extension of the covenants to all overriding interests may be included, as suggested above.

Section 24 also provides that in any transfer, whether or not for valuable consideration, there shall be implied a covenant by the transferee to pay the rent, perform the covenants, and to indemnify; if part only of the land is sold, these implied covenants are mutual. In unregistered conveyancing these are only implied in conveyances for valuable consideration (section 77 (1) (C) and (D), L. P. Act, 1925). The question of expressly amending section 24 does not, however, arise in connection with a transfer on sale.

It may be added that apparently the provisions of section 45 of the Law of Property Act, 1925, requiring a transferee to presume that the covenants in a lease have been duly performed if a receipt for the rent last due is produced, apply to registered conveyancing, so that it is not necessary to refer to this in the contract.

(viii) *Generally.*—It seems proper to point out that in this article an attempt has been made to deal only with such matters as will commonly arise. Some of the less usual cases—*e.g.*, the question of parties to a transfer—will be referred to in the next article, which will consider the subsequent steps in the transfer on sale. Finally, it may be observed that in practice contracts usually incorporate one of the set forms of conditions of sale, the clauses of which must be considered in relation to the various points discussed in this article.

(*To be continued.*)

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Contract for sale—deed over thirty years old—power of attorney. —*Re Copelin's Contract*, [1937] 54 T. L. R. 130, illustrates the difficulties arising on a title where a deed has been executed under a power of attorney. In this case the root of title was a conveyance dated in 1900, and there was a special condition providing that this conveyance was expressed to be made in exercise of a power and the purchaser should assume that the formalities prescribed by the instrument which conferred the power were duly complied with and should not require production of such instrument nor take any objection in respect thereof. On investigation it appeared that the deed was executed under a power of attorney which was not abstracted. Upon requisition made concerning the power of attorney the vendor's solicitors relied upon the condition as excluding any right to make any requisition concerning the power of attorney and stated that they had no information. Subsequently, the vendor resold under the general conditions at a lower price. The purchaser claimed to recover his deposit, and the vendor claimed the difference between the higher and lower price. Crossman, J., held that the abstract was insufficient because it did not include an abstract or copy of the power of attorney. The Law of Property Act, 1925, s. 45, excluding the abstract of any power earlier in date than the root of title, did not apply because of the express exception of powers of attorney by the proviso therein contained. The learned Judge also relied on a passage in Williams' Vendor and Purchaser (4th ed.), p. 160, which states that wherever a deed is executed by attorney this power should be abstracted. He held that the special condition did not apply, because he said (at pp. 449, 450): "The condition would really relate to a case where a deed was executed in the exercise of a power and the vendor wished to protect himself, but that, in my view, does not affect the liability of the vendor arising from the fact that the conveyance was executed by attorney . . . naturally the purchaser thought from the special condition that there was something quite different which it was not desired to disclose." The learned Judge did not particularise what kind of power he had in mind that the purchaser would expect to find hidden by the condition. It may be surmised that he would expect from the

condition that the power was a power of appointment, but the category of powers is so wide that it would seem desirable in all cases to state expressly the character of the power the details and validity of which are to be assumed.

The learned Judge held that, despite the general condition concerning the right of the vendor to forfeit the deposit and resell in the event of the purchaser failing to complete, the purchaser was entitled to the return of his deposit with interest at 4 per cent. and to the costs of the investigation of title.

Power of appointment—fraudulent exercise.—Cases on the fraudulent exercise of a power of appointment are mercifully rare, but when they do appear in the reports they are of corresponding interest. *Re Nicholson's Settlement* (1938), 54 T. L. R. 249, arose in peculiar circumstances. Under the settlement the life tenant had a life interest and, in the events which happened, a power of appointment of income to any husband she might marry for life and subject thereto the property passed over in default of appointment. When the tenant for life was still a spinster aged eighty she attempted negotiations with the persons interested in default with a view to obtaining some of the capital after her death to benefit certain friends. Finding them obdurate she threatened to marry and exercise her power in favour of her future husband. As this had no effect she did ultimately marry a man thirty years younger than herself and exercised her power, but the evidence, which was not disputed, was that there was no agreement between her and the husband in the event of his surviving her. After her death it was sought to set aside the appointment as a fraud on the power. Farwell, J., refused to set aside the appointment. The learned Judge expressed the opinion that a fraud on a power where there was only one object of the power and where there is a class capable of benefiting is totally different. His view was that in the absence of proof of an arrangement between the donee and object of the power, not necessarily a legal bargain, the power could not be impeached. Mere evidence of a possible motive would not apparently affect such a case. Where the objects of a power are a class, evidence of ulterior motive may have effect because it is immaterial that the appointee may not know of the improper motive.

In *Patcher* v. *Paull*, [1915] A. C., at p. 378, Lord Parker said: "Perhaps the most common instance of [a fraud on a power] is where the exercise is due to some bargain between the appointor and appointee, whereby the appointor, or some other person not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointor's purpose and

intention is to secure a benefit for himself, or some other person not an object of the power." It is not a question of obtaining a benefit in the form of property; so, the appointment may be made for the purpose indirectly of securing a decree *nisi* in divorce to be made absolute: *Cochrane* v. *Cochrane*, [1922] 2 Ch. 230. On the surface, therefore, the case noted would appear to fall within the rule of fraud, since there was some evidence of indirect motive to benefit third parties though no actual arrangement was made. It is in the absence of proof that the exercise would benefit third parties that the claim of fraud could not be sustained where there was a single object of the power. This distinction between a single object and a class is reasonable, because the donee may be said to owe a duty of an impartial discretion between the objects of the power but does not owe quite the same duty to the persons entitled in default of appointment. The mere motive to benefit the sole object of the power, perhaps hoping that some good may thereby result to third parties, in preference to the persons in default of appointment is not a fraud on a power. At least this appears to be the principle to be deduced from the case noted.

Party wall—severance—right of user and support.—It was foreseen in an article in *The Conveyancer* (o.s.), Vol. 16, p. 1, that the severance of party walls under the Law of Property Act, 1925, s. 38 (1) might give rise to questions of interpretation. Section 38 (1), having provided for severance, continues: "The owner of each part shall have such rights to support and user over the rest of the structure as may be requisite for conferring rights corresponding to those which would have subsisted" in a valid tenancy in common. In *Upjohn* v. *Seymour Estates, Ltd.* (1938), 54 T. L. R. 465, the problem arose because of two houses built in a terrace one was demolished for the purpose of building flats. The defendants took steps to have the party wall surveyed and in a party wall award the surveyors both expressed the opinion that the wall was in a satisfactory condition to proceed with the demolition of the adjoining house. Unfortunately this proved not to be the case and the demolition caused damage. One of the forms of damage was to leave two open holes in the plaintiff's wall where for some reason the wall on his side had gaps which were closed by the party wall belonging to the defendants according to the award. Through dust and air the plaintiff's stock suffered, and in fact he had to leave the premises. Other damage occurred to the plaintiff's property. Goddard, J., was not asked to assess damage and consequently it is not easy to follow exactly the rights conferred upon the plaintiff by the Act. He found, however, (i) the defendants

did not trespass on the party wall separating their premises from the plaintiff's; (ii) the plaintiff's premises and his moiety of the party wall were entitled to support from the defendants' premises and their moiety of the party wall; (iii) the defendants did withdraw their support and cause damage to the plaintiff and his property.

It is clear, however, that the learned Judge was of opinion that the plaintiff was entitled to protection against the apertures in his part of the party wall by the defendants' moiety of the party wall. It is to be observed that this must fall under user and not support because it is felt that there can hardly be support for a gap. *Watson* v. *Gray*, 14 Ch. D. 192, contains a summary of the rights of tenants in common, but it is not clear how far the incorporation of rights of "user and support" have modified the rights therein indicated. "In *Cubitt* v. *Porter*, 8 B. & C. 257, it had been said that there is a right to pare away one moiety of the wall, and if this was done the moiety of the other owner might be of very little use to him" (*Watson* v. *Gray*, *supra*, at p. 195). It is clear that this statement is not in harmony with the case noted. It is felt that the subject must receive further attention at the hands of the Courts.

Restrictive covenants—enforceability.—White v. *Bijou Mansions* (noted *ante*, p. 71) has been affirmed by the Court of Appeal, (1938), 54 T. L. R. 458, on the point in which Simonds, J., refused to enforce the covenant. The point concerning the Land Registration Act, 1925 (noted *ante*, p. 69) was not argued. It is not necessary to repeat the somewhat complicated facts, but the argument before the Court of Appeal was that where restrictive covenants are inserted by a vendor, who contemplates selling a number of plots, though there is no building scheme, an agreement may be implied from the facts that the covenants are inserted for the advantage of the several purchasers. The Master of the Rolls, who delivered the only judgment, accepted this principle, but said (at p. 461): "Before one can apply this principle, one must be able to infer from the facts that each purchaser contemplated that he was entering into a liability, not only to his vendor, but also to a number of other persons which they could all directly enforce against him." On the facts he held that there was no evidence of such implied agreement. Section 56 (1) of the Law of Property Act, 1925, was also raised, but does not appear to have been strenuously argued, since counsel felt that if he could not succeed on the first point he must fail on the second. The learned Master of the Rolls did, however, say (at p. 462): "What-

ever else section 56 (1) may mean, it is, I think, confined to cases where the person seeking to take advantage of it is a person within the benefit of the covenant in question, if I may use that phrase. The mere fact that somebody comes along and says, 'It would be useful to me if I could enforce that covenant', does not make him a person entitled to enforce it under section 56 (1). Before he can enforce it, he must be a person who falls within the scope and benefit of the covenant according to the true construction of the document in question."

Another example of unenforceable covenants arose on peculiar facts. R contracted to sell an estate to D, but before the contract was completed D sold part of the estate to G. The conveyance was made between R, D and G and was sold subject to certain restrictions. The schedule to the conveyance contained the restrictions mentioned in the contract, but there was no express covenant and the conveyance was not executed by the purchaser. Subsequently the contract between R and D was completed, who sold part of the land to B, and thereafter an assignment of the benefit of the covenants was made by the personal representative of R to B. Simonds, J., held that the covenants were not enforceable by B against G: *Re Rutherford's Conveyance* (1938), 54 T. L. R. 429. So far as the assignment by the personal representative of R to B was concerned, the learned Judge held that this assignment could have no effect by reason of the decision in *Re Union of London and Smith's Bank*, [1933] Ch. 611.

The main point was whether the fact that the conveyance was expressed to be subject to restrictions could imply a covenant in equity with D that the restrictions would be observed. The learned Judge did not decide whether as between G and D some such obligation in equity might have existed. At the most it was an equitable burden, since there was no covenant and no execution by the grantee, but it could not exist between G and a purchaser from D on a contractual basis. The essential difficulty lay in the fact that, as the circumstances were, there was no sufficient definition either of the vendor or the property to be benefited.

It is thought that the facts are too peculiar to afford anything but a warning. It emphasises the importance of ensuring that the deed is executed by the grantee in these cases of covenants, which usually occurs after conveyance and is, therefore, liable to be overlooked. It also brings out the difficulty where plots of land are sold before the conveyance of the main estate is made, as sometimes occurs on building estates. It is suggested that here the essential feature is to ensure that the covenants are entered into both with the builder, who has a contract to purchase the whole

estate, and also the builder's vendor, and that the restrictions are clearly expressed to be for the benefit of the whole estate intended to be developed. The latter point requires some watching, since it is useless to impose restrictions incapable of benefiting the whole estate unless that part of the estate capable of benefiting is specified unambiguously : see *ante*, pp. 73—75.

Sale of completed house—no implied warranty of fitness.—It may be convenient to mention *Hoskins* v. *Woodham*, [1938] 1 All E. R. 692, where an action failed to recover damages brought by a purchaser of a new house for damp floors. The contract was entered into subsequently to completion of the house, and the learned Judge held as a fact that the dampness was due to a defect in the building. He also held that there was no implied warranty of fitness for habitation, citing *Perry* v. *Sharon Development Estates*, [1937] 4 All E. R. 390: see note thereon *ante*, p. 177.

Registered title—merger of contract in transfer.—It is always dangerous to reason from one legal system to another and particularly in a matter so full of technical peculiarities as the land law. *Knight Sugar Co.* v. *Alberta Ry.*, [1938] 1 All E. R. 266, is an instructive case, though its analogies cannot be pushed too far. The appellants, appealing from the Supreme Court of Alberta, wished to rectify the register in respect of certain transactions of transfer which excepted " coal and other minerals ". Prior to the transfer to the appellants the land had been vested in their transferors subject to the exception of coal reserved by Crown grant. By the contract of sale the land was to be sold subject to the exception in the Crown grant. By the instrument of transfer the land was transferred excepting " all coal and other minerals " and the right to use so much of the land as was necessary to work the said coal and minerals. Some seventeen years later the question was raised in connection with petroleum and natural gas which was admitted to be within the definition of minerals. The Privy Council held: (i) " all coal and other minerals " could not be construed *ejusdem generis* with coal because grammatically it was all coal and all other minerals; (ii) the contract was merged in the transfer, and (iii) the transfer, when registered, differed in no relevant respect from any ordinary conveyance of land.

The first point seems to be a clear example of what is called an exception to the *ejusdem generis* rule. " If the particular words exhaust a whole genus, the general words must refer to some larger genus ": *per* Willes, J., in *Fenwick* v. *Schmalz* (1868), L. R. 3 C. P., at p. 315. Lord Russell expresses the same principle when

he says (at p. 269): "Even if the word 'all' is to be restricted in its application to the word 'coal', it would still be impossible to construct out of the single ingredient 'coal' a genus of minerals to which the succeeding general words could be confined." The so-called exception is no true exception, because to treat the general words otherwise would render them completely meaningless.

The latter part of the decision is of interest in so far as it may apply to the system of registered titles in this country. The Land Titles Act, 1906, of Alberta, under which this case was decided, provides that no instrument shall be effectual to pass any estate or interest in the land unless executed and registered in accordance with the Act, but when registered passes the estate or interest subject to the covenants, conditions and contingencies specified in the instrument or implied by the Act: section 50. By section 51 such an instrument operates according to the tenor and intent thereof.

Lord Russell said (at p. 270): "It is the transfer which, when registered, passes the estate or interest in the land, and it appears, for the purpose of the application of the doctrine in question (merger of contract), to differ in no relevant respect from any ordinary conveyance of unregistered land."

The Land Registration Act, 1925, has no identical, or nearly identical, words. By section 69 (4) "the estate for the time being vested in the registered proprietor shall only be capable of being disposed of or dealt with by him in manner authorised by this Act". Section 39 provides that where a transaction relating exclusively to registered land can be carried out by a registered disposition any deed or instrument, other than the registered disposition, shall be void, subject to certain reservations. Section 19 (in the case of freeholds, section 22 is analogous for leaseholds) provides that, until an entry on the register is made by the Registrar entering a transferee on the Proprietorship Register, the transferor is deemed to remain proprietor. Section 20 provides that a disposition when registered confers upon the transferee an estate in fee simple or as the case may be.

The effect of sections 69 and 39 is to override the decision in *Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 631, decided under the old Act, whereby it was held that a legal estate passed prior to registration because the instrument of transfer was under seal. Otherwise the provisions are all based primarily upon the effect on the register of dispositions and not the effect of the instrument in relation to extraneous matters. The tenor of the legislation is to displace the instrument by the registered entry. It is difficult to see the relation between contract and instrument in this respect. With regard to mines and minerals special forms, where they are to

be severed, have been provided (see L. R. R. 111, Forms 25, 26, 27), but this does not affect the real issue. Mines and minerals are registrable interests, since they form part of the definition of land (L. R. A., s. 3 (viii)) and, therefore, fall within the provisions of registered dispositions. It is suggested that, where a registrable interest is in question, the answer must turn upon the somewhat vague principles for rectification of the register contained in section 83 (see Potter, *Registered Land Conveyancing*, chap. XII). There are, however, the other forms of interest which may be affected but are not strictly registrable, and particularly overriding interests, which are frequently created by the instrument leading to registration. So, for example, where a right of way is created by registered transfer, it may be a question whether the contract has been fulfilled. Implicitly, it would seem that to this extent the transfer must be treated as an unregistered instrument. So far as it relates to an overriding interest section 69 has no application, but section 39, which renders deeds void, contains a precise modification, "but only so far as the transaction is carried out by the registered disposition". In the case under consideration we are dealing with a registered disposition, but it may well be argued that, as it would have been valid had it not been registered so far as it concerned overriding interests, it must equally be treated as valid in that respect, because it has been registered. If it is to be treated as valid it is submitted that there is merger of the contract at least to that extent.

Two further points should be made. First, what has been said here must not be taken to assume that overriding interests can be created by deed without a registered disposition (see Potter, *Registered Land Conveyancing*, pp. 272—274) though this is frequently assumed. Secondly, section 83 gives a list of cases in which rectification may be made which certainly goes behind the registered disposition. At the same time there appears to be nothing to prevent the Court, as between parties to a registered disposition, holding that the contract is merged in a registered disposition. "A disposition . . . shall, when registered, confer on the transferee a fee simple . . ." (section 20 (1)), and "when you have a conveyance which expresses the final concluded deliberate terms of the contract, you cannot affect or alter that by reference to the antecedent contract" : *per* Cozens-Hardy, M.R., *Milburn* v. *Lyons*, [1914] 2 Ch., at p. 340. This view, however, must be read in the light of the power of the Court to order rectification to agree with the contract : cf. *Clark* v. *Barnes*, [1929] 2 Ch. 368. The problem is most likely to arise in connection with transfers of part of the land comprised in a title, but this cannot affect the principle.

2. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Derogation from Grant.—The well-known principle that a grantor must not derogate from his grant again arose in the recent case of *Port* v. *Griffith*, [1938] 1 All E. R. 295; 82 S. J. 154.

The principle involved is of great importance and has been defined in a considerable number of judicial decisions. One of the best known of these is *Aldin* v. *Clark*, [1894] 2 Ch. 437; 63 L. J. Ch. 601, where the rule was laid down that the grantor of land to be used for a particular purpose is under an obligation to abstain from doing anything on adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made. In that case a lease of premises was granted for the purpose of the business of a timber merchant, and the lessee covenanted to carry on such business. The assigns of the lessor were held not to be entitled so to build upon adjoining property as to interrupt the access of air to drying sheds on the demised property, so as to interfere with the carrying on of the business in the ordinary course.

The question of derogation from grant was examined carefully by the Privy Council in *Lyttleton Times Co., Ltd.* v. *Warners, Ltd.*, [1907] A. C. 476; 76 L. J. P. C. 100, where it was pointed out that the rule that a grantor may not derogate from his grant is really part of the wider principle that where both parties to a contract intended land to be put to a certain purpose, both should be held to all that was implied in this common intention; but where the common intention was founded upon the belief that two uses of adjoining properties could co-exist without clashing, and they were mistaken in that anticipation, then neither party can have any right against the other; in that case both lessor and lessee intended that a printing business and an hotel should exist in the same building and mistakenly believed that the one would not interfere with the other.

The principle was applied in *Harmer* v. *Jumbil* (*Nigeria*) *Tin Areas, Ltd.*, [1921] 1 Ch. 200; 90 L. J. Ch. 140, to restrain acts done by persons claiming under the lessor which prevented the lessee from lawfully using the demised property for the purpose of an explosives magazine, which was the express purpose for which the property was let to him. In *Grosvenor Hotel Co.* v. *Hamilton*, [1894] 2 Q. B. 836; 63 L. J. Q. B. 661, the rule was applied to vibration caused by the working of engines which rendered the

demised premises useless to the lessee, so that he was obliged to move his business to another house.

Further illustrations might be cited to show the operation of the rule, but the cases referred to above are sufficient to show that in those cases where the Courts have held that there has been a derogation from the grant, something has been done by the lessor which has the effect of substantially preventing the lessee using the demised premises for the purpose for which they were leased. In *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ltd.*, such user was rendered unlawful by reason of the infringement of statutory restrictions. In *Grosvenor Hotel Co.* v. *Hamilton* and in *Aldin* v. *Clark* something was done which had the effect of rendering the premises physically unsuitable for the intended user so that they were actually unfit or materially less fit for the purpose of carrying on the business there.

There is, however, another class of case where an act may be a derogation from the grant although it does not actually prevent the grantee using the premises for the purpose for which they were granted. That is where the grant carries with it the implied grant of an easement, and the act of the grantor in derogation of his grant consists of an interference with the enjoyment by the grantee of that easement. In *Pollard* v. *Gare*, [1901] 1 Ch. 834; 70 L. J. Ch. 404, there was an implied grant of an easement of light upon the leasing of a house, and the Court restrained an assignee of the grantor from so building upon adjoining land as to obstruct the access of light. The house could still be used for purposes of habitation, but as there was an interference with the easement there was an act of derogation from the grant.

In such a case, however, it is essential that there should actually be an infringement of an easement. There is no easement of prospect or privacy, and in *Browne* v. *Flower*, [1911] 1 Ch. 219; 18 L. J. Ch. 181, where the lessor permitted the erection of a staircase which overlooked the windows of the plaintiff's flat so as to constitute a serious interference with the privacy of the rooms, it was held that there was no easement the enjoyment of which had been obstructed or prevented, and the existence of the staircase did not render the plaintiff's premises unfit or materially less fit for use as a residential flat; it merely interfered with the comfort or privacy of the inhabitants. In the circumstances there was therefore no derogation from the lessor's grant.

The decision in *Browne* v. *Flower* was followed in *O'Cedar, Ltd.* v. *Slough Trading Co.*, [1927] 2 K. B. 123; 96 L. J. K. B. 709, where lessees covenanted to pay the cost of fire insurance and the lessors, by letting adjacent premises to a woodworker, materially

increased that cost; Branson, J., held that there was here no derogation from the lessors' grant. The lessors' act had not affected the carrying on by the lessees of their business, but had merely added an increased charge which would affect the profit to be made from their business.

In *Port* v. *Griffith*, Luxmoore, J., has reviewed the above and other authorities in relation to a case where premises were let to the plaintiff for the express purpose of the sale of wool and general trimmings, and were not to be used for any other purpose without the lessors' consent. The lessors later let the adjoining shop for a business which also included the sale of dressmaking trimmings and competed very seriously with the plaintiff's business. The plaintiff contended that this was a derogation from the lessors' grant as frustrating the purpose for which the premises were let. But, as Luxmoore, J., pointed out, the presence of a trade rival next door does not render the premises unfit (or even materially less fit) for the purpose of the business carried on, though it may reduce the profit ratio to be earned in that business. The case was therefore covered by the decisions in *Browne* v. *Flower* and in *O'Cedar, Ltd.* v. *Slough Trading Co.*, and there was no derogation from the lessors' grant.

Rent restriction—decontrol by actual possession—occupation by trespasser.—Section 2 of the Rent and Mortgage Interest Restrictions Act, 1923, which provides for decontrol in the event of a landlord coming into possession of the whole of a dwelling-house (qualified, it will be remembered, by section 2 of the 1933 Act as regards "Class C" dwelling-houses) has given rise to a number of judicial decisions. The Act provides that for the purposes of the section, "possession" is to be construed as meaning "actual possession", and a landlord is not to be deemed to have come into possession by reason only of a change of tenancy made with his consent.

This provision appears to be aimed at any "notional" coming into possession during the interval between the end of an old tenancy and the beginning of a new one : see Bankes, L.J., in *Hall* v. *Rogers* (1925), 41 T. L. R. 341. Nevertheless, physical entry does not seem to be a necessary ingredient of "actual possession", for the mere holding of the keys for a short time while the premises were vacant between two tenancies has been held to amount to actual possession (*Jewish Maternity Society's Trustees* v. *Garfinkle* (1926), 95 L. J. K. B. 766; 42 T. L. R. 589); and in *Thomas* v. *Metropolitan Housing Corporation, Ltd.* (1936), 80 S. J. 205, possession of the keys by the landlord for several days while a

sub-tenant of the old tenant remained in occupation as licensee was held sufficient. Moreover, the possession of a gardener or other servant, who occupies by virtue of his employment and does not pay rent, is of course the possession of the employer, as is illustrated by the case of *Goudge* v. *Broughton*, [1929] 1 K. B. 129; 97 L. J. K. B. 657.

In the recent case of *Holden* v. *Howard* (1937), 54 T. L. R. 251; 158 L. T. 59, it was sought by way of further extension of this principle to establish that the landlord might have actual possession though the premises were in fact in the occupation of a trespasser. Upon the death in 1931 of a tenant who had sub-let part of a controlled house, the sub-tenant wrongfully took possession of the whole house, thereby becoming a trespasser in respect of the part which had not been sub-let to him. The landlord later agreed to let to him the whole of the house and a new tenancy was thereupon created. The question arose whether the landlord had had actual possession between the death of the earlier tenant and the making of the new agreement with the sub-tenant, that is to say, during the period when the sub-tenant occupied as trespasser.

It was suggested that the landlord must be treated as being in possession, notwithstanding that a trespasser may be in actual possession at the time. But the Court of Appeal rejected this contention, holding that upon the true construction of the section the possession of a trespasser is not the possession of the landlord for the purposes of the section. It is indeed evident that a wide difference exists between the case of a gardener or other servant and that of a trespasser. Some confusion appears to have been caused by certain words used by Scrutton, L.J., in *Goudge* v. *Broughton* (*supra*) and in *Remon* v. *City of London Real Property Co.*, [1921] 1 K. B. 49; 89 L. J. K. B. 1105, where the learned Lord Justice apparently classified together occupiers by service and trespassers. Reference to those cases shows, however, that Scrutton, L.J., never suggested that where a trespasser is in occupation, the landlord has possession through the trespasser. The point actually before the Court in those cases was quite a different one, and what Scrutton, L.J., was really pointing out was that a statutory tenancy can only arise where there has been a previous legal tenancy, and there has been no previous legal tenancy in the case of persons whose only occupation of the premises has been as caretakers, occupiers by service, or trespassers, so they cannot claim as statutory tenants to be entitled to the benefit of the Rent Acts. That is another and quite distinct question. Perhaps one of the most useful guides to the meaning of "actual possession" is to be found in the words of Scrutton, L.J., in *Hall* v. *Rogers* (*supra*),

where he says : " I think Parliament in using the phrase ' actual possession ' intended to reject the legal right to possess and to require actual control or apparent dominion in fact."

Rent restriction—recovery of possession on ground of overcharging of rent for sub-let part—where it is reasonable to make such an order.—In section 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, it is laid down in categorical terms that no order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply is to be made or given except in certain specified cases set out in the section and in the First Schedule to the Act; but this is somewhat misleading, because the very next section, section 4, proceeds to carve an exception out of section 3 by providing that notwithstanding anything in section 3, an order or judgment for the recovery of possession of a dwelling-house to which the principal Acts apply may be made or given where the Court considers it reasonable so to do, if the Court is satisfied that the rent charged by the tenant for any sub-let part, which is also a dwelling-house to which the principal Acts apply, was in excess of the recoverable rent for that part.

Boulton v. *Sutherland* (1938), 54 T. L. R. 388, provides an interesting illustration of the operation of section 4. The tenant had charged rent in excess of the recoverable rent for the sub-let portion of a controlled dwelling-house, the sub-let part being also a controlled dwelling-house within the meaning of the Rent Acts. The case therefore came within the purview of section 4. The County Court Judge made an order for the recovery of possession *of the sub-let portion of the house*. It seems, however, that the landlord desired possession for the purpose of going into occupation himself with his wife and four sons, and it was contended *on behalf of the tenant*, as a ground of appeal, that the Judge's order was unreasonable because the dwelling-house of which he awarded possession had only two rooms, and if the landlord went into occupation with his family there would be overcrowding under the Housing Act, 1936.

It is to be observed that section 4 of the 1933 Act only provides that an order *may* be made *where the Court considers it reasonable so to do*, and the specified conditions are complied with. It was suggested in argument in *Boulton* v. *Sutherland* that there must be the same definition of " reasonable " in section 4 as in section 3. In *Williamson* v. *Pallant*, [1924] 2 K. B. 173; 93 L. J. K. B. 726, it was held upon the construction of section 5 of the 1920 Act, which corresponded to section 3 of the 1933 Act, that in considering

whether it is reasonable to make an order the Judge ought to take into consideration every circumstance that may affect the interests of the landlord or of the tenant, including the financial hardship which may be inflicted upon the tenant if an order for possession is made. It was contended that the possibility of overcrowding if the landlord went into occupation of the part of which he was awarded possession was a circumstance having a bearing on the case which the Judge ought to have considered but had not. The Court of Appeal rejected this contention upon the ground that such possible overcrowding was merely a matter of speculation, and there was no evidence for the Judge to consider that the whole of the family would necessarily remain in the two rooms. The Judge was therefore fully entitled to come to the conclusion that it was reasonable that he should make the order, and so the Court of Appeal did not expressly deal with the wider question whether the principles laid down in *Williamson* v. *Pallant* apply to section 4. It would seem, however, from the judgment of Slesser, L.J., that the Court of Appeal prefers to construe section 4 independently of any other section, and indeed it may be thought that, upon principle, circumstances of reasonableness affecting the making of an order under section 3 and the First Schedule do not necessarily have any bearing upon what is a reasonable case for making an order under section 4, where quite a different set of considerations has to be taken into account. Moreover, due weight must be given to the fact that section 4 is expressed to take effect notwithstanding anything contained in section 3.

Mention must be made of one feature of *Boulton* v. *Sutherland* which is not expressly dealt with in the report of the case. In order that section 4 may apply, the sub-let portion of the dwelling-house must itself be a controlled dwelling-house; that is to say, there will normally be a protected sub-tenant in occupation. It would appear from the statement of facts in the judgment of Slesser, L.J., that such was apparently the case here. The effect of the Judge's order, therefore, giving the landlord "possession" of the sub-let part, would, by section 15 (3) of the 1920 Act, be to make the sub-tenant the protected tenant of the landlord, and the landlord would still not be able to go into occupation. In these circumstances, it is a little difficult to see, if the facts are fully set out in the reported judgment, how the question of possible overcrowding under the Housing Act ever really arose. It would appear that in fact, upon the basis of what appears in the report of the case, the practical effect of the Judge's order was in the result to deprive the tenant of her profit from sub-letting and to make the sub-tenant a direct tenant of the landlord at a reduced rental.

3. *WILL CASES.*

By S. J. Bailey, LL.M., Barrister-at-Law.

Apportionment—tenant for life and remainderman—proceeds of sale of securities "cum dividend".—By virtue of the Apportionment Act, 1870, s. 2, all "dividends and other periodical payments in the nature of income shall be considered as accruing from day to day, and shall be apportionable accordingly", unless (section 7) it is "expressly stipulated that no apportionment shall take place". If, therefore, the trustees of a testamentary settlement of stocks sell certain of them "cum dividend" shortly before the end of the financial year, the question arises whether any part of the proceeds of sale should be paid to the tenant for life as income. Decisions prior to the Act of 1870 ignored the claims of tenants for life in these cases, on the ground that the resulting apportionments would usually be too complicated and expensive to be worth while, and because if the sale was followed by re-investment in other securities, purchased "cum dividend", a further apportionment would be necessary in the other direction (see *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173). Nor did the Act of 1870 assist the claims of the life-tenant in such a case; for sections 3 and 4 of the Act have been held to restrict it to cases in which a dividend has actually been paid to the trustees (or other accounting party), and here the dividend is in fact received by the purchaser (see *Bulkeley* v. *Stephens*, [1896] 2 Ch. 241, 248). When the trustees sell for some purpose other than change of investment, the difficulty and expense of apportionment is less severe; but even here the supposed difficulties of making a just apportionment (*e.g.*, of ascertaining the price which would have been obtained had the sale been "ex dividend") have hitherto prevented the Courts from introducing a new practice in favour of tenants for life. Such was the decision of Stirling, J., in *Bulkeley* v. *Stephens*, [1896] 2 Ch. 241. There the problem arose on a sale (cum dividend) for the purposes of distribution among remaindermen on the death of the life-tenant; but since the sale was made (under order of the Court) for convenience of administration, in order to avoid the difficulty of dividing the investments among the numerous remaindermen as required by the will, Stirling, J., regarded the circumstances as sufficiently exceptional to justify a departure from the general practice.

The latest decision on the point, however, appears to show that what was hitherto regarded as the general practice is now reversed: *Re Winterstoke's Will Trusts, Gunn* v. *Richardson*, [1938] 1 Ch. 158 (at p. 162). Here the executors of a tenant for life claimed a

proportion of the proceeds of sale of certain stocks, which had been sold "cum dividend" by the trustees in order to pay death duties. Clauson, J., (as he then was) was clearly of opinion (p. 161) that a sale "cum dividend" ought not to be permitted to deprive a tenant for life or his executor of income to which he would be entitled but for the sale. "The trustees, when they sell the securities, ought so to arrange matters as to preserve, if they reasonably can be preserved, the rights of" the life-tenant. If (as the learned Judge believed is often done) the sale is deferred until the dividend is due, "no difficulty arises, because the trustees will themselves have received the dividend and they will apportion it". If, however, the sale is "cum dividend", the trustees may "set aside out of the purchase price a sum equivalent to the dividend" and pay this (or, if the life-tenant has died, the apportioned part of it) to the life-tenant or his executor, for this will accord with the apparent intentions of the testator.

Although the learned Judge (at p. 162) was inclined to treat somewhat lightly the *dicta* of Stirling, J., in *Bulkeley* v. *Stephens*, he expressly refrained from saying that trustees who sell "cum dividend" commit a breach of trust if "without the question being raised by anybody" they pay no part of the proceeds of sale to the tenant for life or his executor. But "when the question has been raised and there is no difficulty in ascertaining the figure which would be payable, the trustees may and ought to account to the executors of the tenant for life for the apportioned dividend". Here, be it noted, the trustees were seeking the direction of the Court on the matter. But it would seem that the remarks of the learned Judge were intended to apply wherever the question is "being raised"—whether in Court or not.

Codicil—construction—"last will"—latent ambiguity—intention to revive revoked will—Wills Act, 1837, *s.* 22.—If a testator, having previously made two wills, A and B, the latter of which revoked the former, makes a codicil which, though intended to augment and confirm B (the later will), in fact purports to augment and confirm will A, two questions arise. First, does the codicil operate to revive will A? Second, does it revoke will B? According to two decisions of Sir James Hannon, P., it does not thereby revoke will B. But if the draftsman of the codicil not only refers erroneously therein to will A, but further moulds the codicil upon it, will A is thereby revived (*In the Goods of Stedham*, *In the Goods of Dyke* (1881), 6 P. D. 205); for the mind of the solicitor who drafted the codicil was actually applied to will A, and must be treated as the mind of the testator.

Suppose, however, that there is nothing in the codicil, other than a reference to the date of will A, to suggest that this was the will to which the codicil referred, and further that the codicil purports to concern only the testator's "*last*" will. Here, according to the better opinion, will A is not revived. Although *In the Goods of Chilcott*, [1897] P. 223, on these facts, purported to follow the above decisions of Sir James Hannon, and accordingly held that will A was revived by the codicil, this case appears to have been wrongly decided. In three cases, involving similar facts, Sir J. P. Wild pointed out that section 22 of the Wills Act, 1837, allows a codicil to revive a revoked will only if it shows "an intention to revive the same"; he therefore held that a codicil expressed to be a codicil to the testator's "*last*" will operates as such, even though it erroneously describes that "last" will by a date which is in fact the date of an earlier will (*In the Goods of Steele, May, and Wilson* (1868), L. R. 1 P. & D. 575). In *Steele's Case*, be it noted, although the codicil contained a latent ambiguity (the words "last will" coupled with the date of the earlier will) the learned Judge felt able, without invoking the extrinsic evidence of intention which such ambiguity admits, to hold that the codicil showed no intention to revive the earlier will. That case was followed, in like circumstances, by Sir Samuel Evans, P., in *Jane* v. *Jane* (1917), 33 T. L. R. 389; and this, in turn, has been followed by Bucknill, J., in *Goldie* v. *Adam*, [1938] W. N. 74 (reported also *sub nom. In the Estate of Taylor, Goldie* v. *Adam*, [1938] 1 All E. R. 586), where a codicil erroneously referred to a revoked will and to revoked codicils thereto.

In the last-mentioned case, decided a few weeks ago, the words of the codicil, dated 1933, were: "This is the fourth codicil to the last will and testament of me D. C. M. Taylor which bears date June 9, 1929, whereby I give and bequeath . . . In all other respects I confirm my said will and the first three codicils thereto." In fact the will of 1929 and the three codicils thereto had already been revoked by a second will, dated 1932. There was therefore a latent ambiguity in the codicil, for it described as his *last* will one which was not his last. Accordingly, Bucknill, J., admitted extrinsic evidence to ascertain the true intentions of the testator as to this ambiguity in the codicil. The evidence so admitted showed (*inter alia*) that the codicil was drafted, after the virtual retirement of the elderly solicitor who had drafted the two wills and the previous codicils, by a junior partner of the same firm who was apparently unaware of the existence of the will of 1932—for it was in the private safe of his elderly colleague; on the other hand, he knew of the 1929 will and the codicils thereto, for they were

deposited in the clients' safe and he brought them with him when (accompanied by a clerk) he visited the testator to take instructions for the codicil the subject of the action. The rest of the evidence was not very helpful, as both solicitors had since died. Bucknill, J., found as facts (i) that it was doubtful whether the testator ever knew that the codicil referred to his revoked first will and codicils; (ii) that there was no external evidence that when drafting the codicil the solicitor applied his mind to the provisions of the revoked will and codicils, or that the testator had decided to revive them; and (iii) that the codicil contained no words of revival other than "the very inappropriate words 'the last will' and 'I confirm'". He therefore held that the first will and its three codicils remained revoked and that the words referring to them in the disputed codicil should be omitted from the grant of probate; and he admitted to probate the disputed codicil (subject as above) together with the second will.

Will—construction—gift over of "any legacy which by the death of any person shall lapse"—secondary meaning of "lapse"—Rule in Jones *v.* Westcomb—*gift over extended by necessary implication.*—The Court of Appeal, in *Re Fox's Estate, Dawes* v. *Druitt*, [1937] 4 All E. R. 664, was concerned with a short will which, though in certain respects couched in homely and non-technical language ("I give to my executors all my substance", etc.), made free use of a number of technical terms (*e.g.*, "for her separate use", "vested", "lapse"). The testator died in 1878. His property was largely real estate, and was to be held by his executors upon trust "as to one-fourth part for my daughter Anna for her sole use during her life, and after her decease for her children if she shall leave children equally". The will further declared that "benefit hereunder shall become vested on the coming of age of the legatee and that any legacy which by the death of any person shall lapse shall go to my daughter Fanny." Anna, though married at the date of the will, never had any children. The question therefore arose whether the quarter held upon trust for her for life devolved on her death upon Fanny, or whether it was undisposed of. The Court of Appeal, reversing Bennett, J., held that it devolved upon Fanny.

In view of the homely nature of the will, the word "lapse", associated with the phrase "by the death of any person", was held to bear a non-technical meaning—*viz.*, failure through death whether before or after the death of the testator. This did not of itself bring into the gift over the share intended for Anna's (non-

existent) children, for their legacy failed through the non-existence —not through the death—" of any person ". But, on applying the Rule in *Jones* v. *Westcomb* (1711), Prec. Ch. 316, the gift over became wide enough to include it. In the words of Romer, L.J., that rule applies when the Court, on construing the will in the light of the surrounding facts, " comes to the conclusion that the testator must *a fortiori* have intended the disposition over to take effect in the event which has actually happened, although it is not the event which he has specified in his will as the one in which the gift over is to take effect ". In the Court below, Bennett, J., felt unable to apply that rule to the present facts—apparently because the technical word " lapse " appeared unequivocally to restrict the operation of the gift over to one single event, namely, death of a legatee during the testator's lifetime. But, as we have seen, the Court of Appeal considered that the word was here used in a non-technical sense. Moreover, Greene, M.R., stated (*obiter*, perhaps) that, even if the word " lapse " should here be construed in its narrowest sense, the present " would be a case, and a typical case, for the application of the rule ", because the testator, having made provision for the event on which Anna's children are to take (namely, if she leaves children at her death) has in the gift over provided for only one of the events (namely, their death before the testator) on the happening of which their legacy would fail. In *Jones* v. *Westcomb* the facts were very similar: bequest to testator's wife for life, remainder to the child of which he mistakenly supposed her to be *enceinte*, with a gift over if that child die under twenty-one; *held*, the gift over operated by necessary implication if such child never came into existence. But it should be remembered that the rule applies only to gifts over (compare *Scalé* v. *Rawlins*, [1892] A. C. 342), and only if on a true construction of the will it is evident that such must have been the testator's intention.

Will—construction—pecuniary legacies—some given priority by the will—no residue—delay in distribution—whether legacies given priority have priority as to interest.—The well-established rule, whereby general pecuniary legacies ordinarily carry interest as from the end of the executor's year, was analysed by Farwell, J., in *Re Wyles*, *Foster* v. *Wyles*, [1938] W. N. 30; (1938), 54 T. L. R. 336. Sums thus payable by way of interest, he held, are in no sense a bounty of the testator: they are sums which are given in the course of administration because it would be unjust if failure to pay pecuniary legatees in due time were allowed to increase the residuary estate at their expense. In *Re Wyles* the will contained certain

specific gifts and a large number of pecuniary legacies, and the will provided that should the estate prove insufficient to pay all legacies in full the pecuniary legacies of A and B were to abate in priority to all other legacies. Owing to difficulties of administration, it was not possible to pay the legacies within the executor's year. The estate being insufficient to pay all legacies in full, the legacies given to A and B abated *pro tanto*. The other pecuniary legatees, however, claimed that the delay in payment entitled them to interest on their legacies, and that such interest (like their legacies) was payable in priority to the legacies of A and B. The learned Judge held that this claim failed. The ground of his decision was, it seems, that there was nothing in the will to show that the testator intended to reduce the legacies of A and B except for the purpose of paying other legacies given by the will, and that any interest payable on a delayed legacy is given not by the will but by a rule of administration designed to prevent injustice. Apparently, no previous authority exists on the point; but, with all respect, one would have thought that if, when executors delay payment, there is a rule of justice which precludes residuary legatees from benefiting thereby at the expense of pecuniary legacies, that rule would also preclude other deferred legacies from so benefiting. The estate, it seems, was earning income pending distribution (*per* counsel, 1 All E. R. 349). Whether the effect of the decision was to appropriate the whole of that income to the deferred legacies, or merely to ensure that they would not abate in order to provide interest for the other legacies in so far as the actual income was insufficient to do so, is not altogether clear.

Will—construction—"the residue to be disposed of as the executors shall think fit".—Not long ago Clauson, J. (as he then was), decided that the repeal of the Executors Act, 1830, does not enable an executor to take undisposed-of personalty beneficially (*Re Skeats*, [1936] Ch. 683). More recently, in *Re Carville*, *Shone* v. *Walthamstow B. C.*, [1937] 4 All E. R. 464, the same learned Judge considered the effect of a residuary clause in a home-made will: "the residue to be disposed of as the executors shall think fit". Quoting from the Irish case of *Fenton* v. *Nevin* (1893), 31 L. R. Ir. 478, he stated the rule as follows: "Before an executor can take any part of the assets beneficially, he must show that the testator has given it to him as an individual." Nothing in the present will showed that the testatrix intended to confer the beneficial interest upon the executors or upon any other person; and the fact that other legatees, unlike the executors here, were mentioned by name, the precise amounts of their legacies being prescribed,

appears to have assisted in this conclusion. Accordingly, her executors were held to have obtained the residue as trustees for the persons entitled on a partial intestacy by virtue of the Administration of Estates Act, 1925. Among the pecuniary legacies given by the will was a bequest "To each of my executors £100". The learned Judge drew attention to this fact, but did not specifically say that he considered it weighed against the executors' claim to the residue. But it may be noted that such a legacy to executors raised a rebuttable presumption of law against their claim to undisposed-of personalty in the days (before the Act of 1925) when executors were entitled thereto in the absence of next-of-kin (see *Hawkins on Wills*, 3rd ed., 364-5).

Will—testamentary capacity—insane delusion—probate granted after deleting clause affected by delusion.—The judgment of Langton, J., in the recent case *In the Estate of Bohrmann, Cæsar and Watmough* v. *Bohrmann*, [1938] 1 All E. R. 271, exemplifies the great difficulties which confront a Court of Probate when the evidence suggests that a testator suffered from some form of delusional insanity. A wealthy testator died in 1933, having made a will dated 1926 and four codicils thereto. Clause 2 of the fourth codicil, which was executed in 1932, directed that clause 6 of his will containing bequests to a number of English charities should be construed as if the words "the United States of America" were substituted for the word "England". Apart from this, neither the will nor its codicils contained anything peculiar, save that the bequests to his cousins (his nearest relatives) were small in relation to the value of his estate.

Evidence was adduced to show that the testator was abnormally deficient in human affections and in the common instincts of mankind and that this deficiency, though not necessarily precluding perfect intelligence on other matters, was attributable to a form of mental disease. Counsel argued that, according to the test formulated by Cockburn, C.J., in *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B. 549, 565, such deficiency operates to invalidate a will. Apparently the learned Judge was not convinced that the alleged deficiency was established in the present case. But he held that, even if it were, the words of Cockburn, C.J., prescribe two further elements—*viz.*, that "insane suspicion or aversion take the place of natural affection" and that "reason and judgment are lost and the mind becomes a prey to insane delusions calculated to lead to a testamentary disposition due only to their baleful influence". The three elements of the test should be read conjunctively; neither suffices by itself.

Probate was refused of clause 2 of the fourth codicil (dated September, 1932), on the ground that from February, 1932, when the testator returned from a visit to New Zealand, he suffered from an insane delusion that the London County Council were persecuting him. To this delusion the learned Judge attributed the testator's decision to exclude English charities from his will. The rest of the fourth codicil, together with the earlier codicils and the will, was admitted to probate. Although no precedent could be found for refusing probate of such parts of a testamentary instrument as were dictated by an insane delusion and admitting to probate such parts as were not affected by the delusion, the learned Judge held this to be consistent with the general practice of deleting from a will passages which were not brought to the knowledge and approval of a sane testator.

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4. *INCOME TAX CASES.*

By L. J. Stein, Barrister-at-Law.

[*Note.*—The decisions selected for notice are not necessarily those of the greatest importance from the standpoint of the income tax practitioner but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Interest "paid"—interest added by bank to existing debt.—Though a full report is not available at the time of writing this note, it seems desirable, in view of the importance of the case, to draw attention to the recent decision of the House of Lords in *Paton* (*as Trustee for Fenton*) v. *C. I. R.* (*The Times* newspaper, March 5, 1938). The appeal related to a bank interest repayment claim under section 36 of the Income Tax Act, 1918. The interest in respect of which the disputed claim was made was interest on a bank loan. It had been debited half-yearly by the bank and added to the principal of the loan. The taxed income of the borrower for the relevant years was sufficient to cover the amount of the interest. Two points arose on the claim under section 36—first, as to whether the interest had been "paid", and, secondly, as to whether, if "paid", it had been "paid out of profits and gains brought into charge to tax". In the Court of Appeal (see 15 A. T. C. 11) the first point was decided in favour of the taxpayer on the authority of the decision in *C. I. R.* v. *Holder*, 16 T. C. 640. On the second point, however, the Court of Appeal decided in favour of the Crown on the ground that the taxpayer has not an unlimited

liberty, in all circumstances, to attribute a payment to a taxed fund to the extent to which a taxed fund was available; that the actual facts of the case are not to be disregarded; and that in this case it was clear on the facts that the interest paid (or deemed to have been paid) could on no view be said to have been paid out of the borrower's taxed income.

In the House of Lords the second point was not reached, it being unanimously decided that the Crown succeeded on the first point, *i.e.*, that the interest had not, within the meaning of section 36, been "paid" at all. In *Holder's Case*, above, the House of Lords took a view which made it unnecessary for the House to consider whether the Court of Appeal had been right in holding that the debiting of interest by a bank must be deemed to be a payment of interest by the customer by means of an advance made to him for that purpose by the bank. In *Paton's Case* the House of Lords has now decided that the view taken on that point by the Court of Appeal was incorrect, and that the section 36 claim must fail *in limine*, since the true position was that the interest was not capitalised because it had in fact been paid, but was capitalised because it had *not* in fact been paid, Russell, J.'s, observations to that effect in *Re Jauncey*, [1926] 1 Ch. 471, at p. 476 (which referred to a question of accounts as between mortgagor and mortgagee) being none the less applicable because it was here a question of accounts as between banker and customer.

Until the text of the speeches in the House of Lords is available, it would be premature to discuss the full implications of the decision in *Paton's Case*, including (*inter alia*) its bearing on such decisions as those in *Carnarvon* v. *C. I. R.*, 19 T. C. 455; *Marland* v. *C. I. R.*, 19 T. C. 467; and *C. I. R.* v. *Lawrence, Graham*, [1937] 2 All E. R. 1.

Effect of covenant by lessor to pay all taxes.—Can a lessor be held strictly to a covenant by him to pay all existing and future taxes, irrespective of the extent to which, subsequently to the granting of the lease, the Schedule A assessment is raised, and notwithstanding that the result will be to enable the lessee (or his assignee) to enjoy, free of tax, the full benefit of any profit rental which he may be able to obtain as a result of an increase in the value of the property? In *Mason* v. *Pall Mall Deposit and Forwarding Co., Ltd.*, 16 A. T. C. 373, Clauson, J., unhesitatingly answered this question in the affirmative. In 1923 X granted a lease to Y at a rental of £520. In 1926 the lease was assigned to Z, who sub-let a part of the premises at a rental substantially

in excess of the rent of £520 payable to X under the lease. In due course the Schedule A assessment was raised to a figure considerably exceeding that at which it had stood when the lease was granted in 1923, with the result that, if the whole burden of the Schedule A tax fell to be borne by X, his net incomings would be much less than had been originally contemplated, while the whole benefit of the increased value of the premises would be enjoyed, free of tax, by Z. It was held, nevertheless, that the decision in *Salaman* v. *Holford*, [1909] 2 Ch. 602, was conclusive against the lessor, who must be held strictly to his covenant, no matter how seriously unforeseen circumstances might have caused it to operate to his disadvantage.

Income from employment partly abroad and partly in the United Kingdom—employee resident in the United Kingdom.—What is the tax position of a person resident in the United Kingdom who holds an appointment involving duties to be carried out abroad? By what test is it to be decided whether he is taxable only on remittances to the United Kingdom under Case V of Schedule D or on the whole profits of his employment under the Rules of Schedule E as they apply, by virtue of section 18 of the Finance Act, 1922, to income from offices and employments formerly taxable under Schedule D? Does it make any difference whether the duties of the employment are performed wholly abroad or partly abroad and partly in the United Kingdom?

These were the questions raised and (subject to the further appeal understood to be pending) disposed of by the Court of Appeal in *Bennett* v. *Marshall* (1938), 54 T. L. R. 320. The facts were simple. The taxpayer was for tax purposes resident in the United Kingdom. He held an appointment under an American company, whose headquarters were at Dayton, Ohio. His duties were carried out mainly abroad but partly in the United Kingdom. His remuneration was paid into his banking account in Canada. On these facts the Crown sought to tax him on the whole profits of his employment under Schedule E. The Crown's contention was that Schedule E was applicable, and not Case V of Schedule D, since the duties of the employment were not performed wholly outside the United Kingdom from which it followed (so it was argued) that the income could not be treated as income from a foreign possession. The Court of Appeal unanimously rejected this contention and held that tax was chargeable under Case V of Schedule D. It was pointed out in the judgments that because, in relation to the profits of a trade or a profession, Case V applies only where the trade or profession is

wholly carried on abroad, it does not follow that the same test is to be applied in the case of an employment. What must be looked for is, in every case, the source of income. In the case of a trade or a profession it is impossible to point to any particular contract or any particular payment as the source of income. In those circumstances, the source of income can properly be said to be the whole activities of the person who carries on the trade or the profession. If a part of those activities is carried on in the United Kingdom, the source of income cannot be said to be abroad and the income cannot be brought within Case V of Schedule D as income from a foreign possession. Employments are on a different footing. There it is not necessary, for lack of anything more specific, to find the source of income in the sum total of the employee's activities. There is a definite contract and definite remuneration payable thereunder. It is there that the source of the employee's income is to be looked for, and the speeches of Lords Dunedin and Buckmaster in *Foulsham* v. *Pickles*, [1925] A. C. 458, provide authority for the proposition that in the case of employments the source of income is to be taken to be the remuneration contracted to be paid by the employer. By this reasoning the Court of Appeal, in *Bennett* v. *Marshall*, arrived at the conclusion that the taxpayer's income in that case fell to be treated as income from a foreign possession, and that it was immaterial that a part of his duties were performed in the United Kingdom. The Master of the Rolls said that " the source of income is to be looked for in the place where the income really comes to the employee, and that place is *Canada* ". The Master of the Rolls, therefore, would appear to have considered that what had to be looked at was the place of payment, without reference to the place where the contract was made or where the employer resided. On the other hand, MacKinnon, L.J., said that " the question . . . is what is the source of the income of the respondent's employment? . . . I think that clearly it was *the United States, in Ohio* ". The Lord Justice then goes on to point out that " the contract under which the respondent was employed was made in Ohio; his remuneration arising from that contract was paid to him in Canada by remittance from Ohio ". Romer, L.J., laid it down that the source of income, in the case of an employment, was " either the place where the contract for payment is deemed to have a locality or the place where the payments for the employment are made, which may mean the same thing ", but he did not expressly state whether, in the case before the Court, the source was to be found in Canada or in the United States. The distinction between Canada and the United States was in this particular case immaterial, the

only question being whether the source of income was outside the United Kingdom—a question which all three members of the Court agreed in answering in the affirmative. It is, however, possible to imagine circumstances in which, for the purpose of applying the principles laid down in *Bennett* v. *Marshall*, it would be important to know whether the true source of income in that case is to be taken to have been Canada, where the payments were received, or the United States, where they originated and where the contract of employment was made and the employer resided.

[*Note.*—In view of the importance of the decision in *Bennet* v. *Marshall*, it is noted here, though it is understood to be now under appeal to the House of Lords.]

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5. *DEATH DUTIES CASES.*

By L. J. Stein, Barrister-at-Law.

Cesser of widow's annuity—testator domiciled in Northern Ireland—at annuitant's death estate partly invested in England.—In *Re White*, [1938] W. N. 57, a testator domiciled in Northern Ireland had bequeathed the whole of his property to certain individuals, subject (*inter alia*) to the payment of a life annuity to his wife. At the testator's death the value of his personal estate in Great Britain was less than £100, and accordingly no estate duty was leviable in Great Britain. After his death his residuary estate was dealt with by the executors in such a manner that at the time of the widow's death in February, 1936, part of it was represented by investments locally situate in Great Britain, with the result that on the widow's death the English Revenue authorities claimed estate duty in respect of the cesser of the annuity under section 2 (1) (b) of the Finance Act, 1894. The residuary estate having at the widow's death consisted only in part of investments locally situate in Great Britain, it was pointed out by Clauson, J., that, assuming duty to be leviable, it must be levied on the footing that the annuity fell to be treated as charged proportionately upon the various items of property constituting the residuary estate. It was, however, contended by the widow's executors that estate duty in respect of the cesser of the annuity was not leviable in England at all. It was argued that the property constituting the residuary estate was not property in which the deceased had an interest; the property, and the only property, in which she had an interest in respect of the annuity was (it was

said) the chose in action consisting of the right to take proceedings for the due administration of the testator's estate. It was contended that the proper forum for that purpose being the Courts of Northern Ireland, it followed that estate duty was not leviable by the English Revenue authorities, since the property in which the deceased had an interest was situate out of Great Britain. On this point Clauson, J., held that, granted the premiss, the conclusion was correct, but that the premiss could not stand, the true view being that the deceased had, in respect of her annuity, a charge on the property constituting the residuary estate. The decision that this was the position, and that the annuity must be taken to be charged proportionately on the various items of property constituting the residuary estate, is of interest in relation to certain questions which arise with regard to the income tax position of annuitants (see, for example, *C. I. R.* v. *Crawshay*, 19 T. C. 715).

It was further sought by the widow's executors to invoke the exemption provided by section 5 (2) of the Finance Act, 1894, as amended by section 14 of the Finance Act, 1914, in respect of settled property which bore estate duty on the death of the deceased's spouse. But the only estate duty which had been paid on the death of the testator was estate duty levied by the Northern Ireland authorities, and, the widow having died before the coming into force of the Finance Act, 1936, it was held that the duty paid to the Northern Ireland authorities did not satisfy the words "estate duty has been paid" in the relevant provisions of the 1894 and 1914 Acts. If the widow had died after the coming into force of the Finance Act, 1936 (July 16, 1936) the position would have been different by reason of the provisions of section 25 of that Act.

Direction to pay "all death duties (payable in consequence of my death)"—legacies not expressly given free of duty.—The question decided in *Re Borough*, [1938] 1 All E. R. 375, is simple but important. Certain legacies bequeathed by a testator were expressly directed to be paid free of duty. As to certain other legacies the testator gave no such direction. The residuary estate was left upon trust for sale or conversion with provision for the payment (*inter alia*) of "all death duties (payable in consequence of my death)". Did these words mean that residue was to bear the legacy duty on legacies not expressly directed to be paid free of duty? Simonds, J., decided that they did not, holding that the death duties "payable in consequence of my death" must, in this context, be taken to mean those duties, and those only, which would (as would estate duty) be payable irrespective of the

testator's testamentary dispositions or even if he made no such dispositions at all.

Objects of national interest—"proceeds of sale".—The effect of section 40 of the Finance Act, 1930, is that where property passing on the death of any person includes any object which appears to the Treasury to be of national, scientific, historic or artistic interest, the value of that object is for death duties purposes to be disregarded unless and until it is sold to some purchaser other than a national institution or public body of the character described in the Act. If and when such a sale takes place, "death duties . . . become chargeable on the *proceeds of sale* in respect of the last death on which the objects passed". In *Tyser* v. *Att.-Gen.*, [1938] W. N. 110, certain objects within the scope of section 40 of the 1930 Act were sold. The Crown contended that the "proceeds of sale" must be taken to be the gross amount realised, without any allowance for commission or other sale expenses. It was held by Simonds, J., that "the proceeds of sale" did not mean the same thing as "the price paid", and that the amount to be taken for the purpose of section 40 was not the amount paid by the purchaser but the net amount coming into the hands of the vendor after deduction of expenses.

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THE NEW "PRIDEAUX" COMPLETED.

PRIDEAUX'S FORMS AND PRECEDENTS IN CONVEYANCING (incorporating Wolstenholme's Forms and Precedents) with Dissertations and Notes. Twenty-third edition. By RANALD MARTIN CUNLIFFE MUNRO, B.A., and Sir LANCELOT HENRY ELPHINSTONE, M.A., formerly Chief Justice of the Federated Malay States; both of Lincoln's Inn, Barristers-at-Law. In three volumes. Vol. II, xcv + 1192 pp.; Vol. III, cxii + 1167 pp. London: Stevens & Sons, Ltd., and The Solicitors' Law Stationery Society, Ltd. 1937. £6 6s. net the three volumes.

The twenty-third edition of *Prideaux's Forms and Precedents in Conveyancing* has now been completed by the issue of the third volume.

Volume II is devoted to Leases (formerly in Volume III), Mortgages, Bills of Sale, Powers of Attorney, Partnership, and Patents; Volume III contains the sections dealing with Settlements, New Trustees, Wills, Assents, and Charities, and a few miscellaneous forms. Volume I, already reviewed, dealt, as will be remembered, with sales and exchanges of land.

The introductory dissertation on leases in Volume II has been revised and partly rewritten, with special attention to the Landlord and Tenant Act, 1927, and the Rent Restrictions Acts, and the rest of the volume has been practically entirely rewritten. The last edition (the twenty-second) was completed in November, 1925, before the reforms introduced by the property legislation of that year had become operative; now that there has been twelve years of practical experience of the new system, much alteration is obviously necessary, and the new editors can speak in this respect with a larger authority than did their distinguished predecessor the late Sir Benjamin Cherry. In Volume III a few new forms have been added in the section dealing with personalty settlements, including precedents dealing with the saving of income tax and death duties. Real settlement and realty will forms have in some cases been recast after consideration, and there is a new introductory note on vesting instruments. The introductory note on charities has been rewritten, and a gallant (and, on the whole, successful) attempt has been made to expound that terrible stumbling-block, "mixed charities"—charities, that is, the property of which is exempted from the jurisdiction of the Board of Education and the Charity Commissioners under section 62 of the Charitable Trusts Act, 1853. Four pages of addenda and corrigenda for the three volumes are also added.

The excellencies and the shortcomings of precedent books are not easily to be assessed by such perusal as is possible for the purposes of a review; it is only after the practitioner has used the book in everyday work over some years that he is in a position fairly to estimate to what extent it has helped him in moments of difficulty or betrayed him by omissions or insufficiencies. Some examination may, however, be permitted of a few features of this work to which the writer has been able to devote a measure of attention.

It does not appear, so far as the writer's investigation goes, that the subject of concurrent leases has been dealt with. As conveyancers are aware whose practices touch on extensive property investment and speculation transactions, the problems of concurrent leases are becoming increasingly important. To take a familiar example, that of the terrace of lock-up shops with flats

over which is so usual a feature of the expanding lower middle-class building estates; here the speculator lets off his shops for short terms, as a rule for a twenty-one-year term with breaks at the seventh and fourteenth years. Having completed these initial lettings, the speculator in many cases does not immediately dispose of the freehold reversion; it seems that, for some business or economic reason beyond the comprehension of the present writer, he can do better than that. He first creates a freehold ground rent by granting a lease of the whole terrace for a long term, subject to and with the benefit of the shorter lettings; what he can get for this lease *and* the freehold reversion expectant thereon is, one is given to understand, more than he can get for a freehold reversion expectant immediately on the short terms. Now in the case envisaged we have concurrent leases; the demise by the later lease, for the long term, operates as an assignment *pro tanto* of the reversions expectant on the earlier, short, terms. Apart from any questions in relation to insurances, which arise in some of these cases, the lessee's covenants in the later lease ought clearly to include one to observe during the long term the lessor's covenants in the earlier leases, and to indemnify the freeholder against them. And how about the proviso for re-entry? It seems extremely doubtful whether the common form (II *Prideaux*, 23rd ed., p. 125) is really suited to this case; reference may perhaps usefully be made to the third (1876) edition of *Davidson's Precedents*, Vol. V, Part I, p. 279, where the problem is considered.

In the section dealing with mortgages there is much to admire. In the introductory dissertation the remarks (Vol. II, pp. 312, 313) as to restrictions on the right to redeem and clogs on the equity are brief but good, and give more assistance than most of the text-books do on the practicalities of this question. The doctrine is fairly stated, without so much of the confusion which often encompasses its exposition. Instalment mortgages for building advances are very common nowadays, and problems frequently arise in connection with these as to the restrictions imposed on the right to redeem. Form 84, on page 371 of Volume II, for inclusion in a registered charge, is good; it tackles the problems referred to on pp. 191 and 192 of *Brickdale & Stewart-Wallace* (3rd ed.) in relation to the possibility that, until registration of a charge, there is no covenantee under the covenants implied by section 28 of the Land Registration Act, 1925, and the possibility that the implied covenants may cease to operate if the charge is cancelled by sale, foreclosure, or long possession. We may also note for honourable mention Form 132 on page 395 of this volume (covenant to pay death duties, for inclusion in a mortgage of a reversion, to meet

the point raised by Mr. Withers in the second edition of his work on *Reversions*, p. 401) and Form 139 on page 398 (waiver by a surety of his right to participate in the security until the entire debt is paid, for inclusion where the surety's liability is for part only of the debt, or is limited).

There is in the mortgage section a satisfactory number of forms for mortgages of reversions, stock mortgages, and charges of registered land. We have, however, been unable to find a form for the covenant to proceed with registration which is necessary where a charge or mortgage of land in a compulsory area, not yet registered, is made contemporaneously with completion of the purchase of the land which induces first registration.

In the section in Volume II which deals with Deeds of Arrangement the suggestion is made (p. 769, note (*c*), and repeated p. 774, note (*e*) and p. 778, note (*a*)) that where land is included there ought to be two trustees. The trustee of a deed of arrangement is, under the Law of Property (Amendment) Act, 1926, s. 3 (1), a trust corporation. This slip is corrected in the addenda and corrigenda printed in Volume III.

Sir Lancelot Elphinstone is solely responsible for the twenty-four pages of introductory matter and thirty-two pages of forms devoted to Patents.

In the introductory dissertation which precedes the forms of Personal Settlements at the beginning of Volume III, as in the notes which accompany the forms, many of the considerations are dealt with which were recently examined in these pages in Mr. F. E. Farrer's article on the effect on settlement trusts of the Law Reform (Married Women and Tortfeasors) Act, 1935 (I *The Conveyancer* (N.S.), pp. 97 *et seq.*). The warning footnote to Form XII in III *Prideaux* (23rd ed.), at p. 211, for a self-protective settlement by a bachelor of his own property on himself might in our opinion have been expressed rather more strongly; there is a good footnote on page 127 to which the practitioner might be wisely advised to refer when considering what form a self-protective settlement should take; the form on page 211 is, however, satisfactory in itself.

Insufficient attention is paid in practice—through ignorance or oversight—to the principle enunciated in § 12 of Mr. Farrer's article, that a man cannot settle his own property on himself till he goes bankrupt so as to avoid the results of bankruptcy. It is a matter for some surprise to find no reference in Volume III of *Prideaux* to *Higginbotham* v. *Holme*, 19 Ves. 88. As Mr. Farrer points out, also, there are sound reasons, since the alterations effected by the 1935 Act, for omitting from the ultimate trusts of

a wife's fortune the general power of appointment by deed which hitherto has been usual, whereunder she has a contingent interest which can no longer be protected from anticipation; a note to this effect at page 133 would probably be useful.

Section 21 of the Finance Act, 1936, has played havoc with the tax-saving devices with which since the 1922 Act we had become familiar; there are, however, some useful forms of settlements for avoiding income tax and death duties, so far as this may be done nowadays.

In the section devoted to appointments under powers and surrenders there are some useful forms, including appointments with simultaneous surrenders of life interests, with due attention to the death-duty problems which attend such transactions. In the section devoted to real settlements, the form which in the twenty-second edition appeared on page 254 of Volume III, and which provided that notwithstanding that a discretionary trust had come into operation the tenant for life should continue as protector, has been omitted in view of the decision in *Re Blandy Jenkins*, [1917] 1 Ch. 46. The preliminary note to the precedents of Vesting Instruments wisely remarks that in such instruments recitals will seldom be required; let us hope that this advice will be taken to heart by those practitioners who still persist in putting recitals into everything they settle. There are plenty of forms given for these instruments, and recitals are indicated only where they are really desirable.

There is a goodly gathering of forms for the appointment of new trustees in various circumstances, their discharge, and of forms of releases on the winding up of trusts; some of these are unusual, but are likely to be useful in practice. As with so many other sections of this old and excellent work, there are many practical forms and precedents which it would be difficult or even impossible to find elsewhere.

Space does not permit of any critical examination of the forms and precedents printed in the sections devoted to Wills and Charities; it must suffice to say that the old high standard is maintained in the present edition. The Miscellaneous Precedents at the end of Volume III include an Apprenticeship Deed, Articles of Clerkship, Light and Air Agreements, a Building Contract, a street dedication deed, and a lease for pithead baths—all likely to be useful to practitioners.

The labour involved in the production of this edition must have been considerable. The editors are to be congratulated on the excellence of the result.

P. F.